Thurman - Argument in Case of Ross Vs Ross

ROSS COMMON PLEAS.

APRIL TERM, 1859.

JANE ROSS vs. ALEXANDER ROSS ET ALS.

CLOSING ARGUMENT FOR DEFENDANTS,

BY MR. THURMAN.

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ROSS COUNTY COMMON PLEAS.

JANE ROSS v. ALEXANDER ROSS ET. AL.

I. That the ante-nuptial contract is prima facie valid, and therefore requires no extrinsic evidence to support it unless impeached, is manifestly true.

Stilley v. *Folger*, 14 O. R., 610.

Hardy v. *Van Harlingen*, 7 O. S. R., 208.

Scheferling v. *Huffman*, 4 Ib., 242.

Every contract made by parties able to contract, in reference to a legitimate subject of contract, and containing no provision forbidden by law, is prima facie valid—and no case can be found in which it is intimated that ante-nuptial contracts are exceptions to this rule. On the contrary, *Stilley* v. *Folger* distinctly recognizes it, for the Court in that case refused to hold the contract to be void in the absence of testimony to impeach it. Indeed, marriage contracts are favored by Courts, and upon the soundest principles of policy and justice. "I can see no reason [said the Judge delivering the opinion of the Court in *Andrews* v. *Andrews*, 8 Con., 85,] why such an agreement, deliberately made, and upon sufficient consideration, should not be enforced in chancery. Such contracts, especially in late marriages, are not unusual. *They are opposed to no rule of law, nor to any principle of sound policy. On the contrary, they are, in my judgment, highly beneficial, and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry*

them into effect; and especially is this true, where the contract has been executed, in good faith, by one of the parties."

So, in *Stilley* v. *Folger*, 14, O. R., 649.

"Why, then, should not this agreement be enforced? Antenuptial contracts have long been regarded as within the policy of the law, both at Westminster and in the United States. They are in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes, contentions about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled, at this day, that *almost any* bona fide and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether during the coverture or after his death, *will be carried into execution in a court of chancery.*"

So, in *Scheferling* v. *Huffman*, 4 O. S. R., 241, 250, the Court said, in reference to a most extraordinary contract by which the intended husband stipulated not only that his intended wife should have the whole of her own property, *but also all the property they should mutually acquire during the coverture,* "nor do we perceive that the execution of this contract, in this country, according to the original intention, would interfere at all with the policy of our own laws"—and, further, that no good reason could be assigned why it should not be executed.

Indeed, such contracts are frequently the only means to prevent the injustice that would otherwise result from the *generality* of our laws. The law, and especially statute law, can only provide *general* rules—rules that in a large majority of cases are wise and just, but that would be intolerable in *particular cases* were there no means of taking them out of their operation Thus the Statutes of Descent and Distribution provide for the disposition of estates after the owner's death; but how monstrous and revolting would the consequences frequently be, if this disposition were inevitable? Were such the case, no dying man or woman could make the least provision for the nearest and dearest and most necessitous relative or friend. No aged and decrepit father or mother, no affectionate and needy sister, no kind friend

to whom were due the strongest obligations, no faithful humble servant, could receive a cent from the bounty of the deceased, however ample the estate might be. Nay, worse. The estate might be no more than necessary for the support of a devoted wife, dearer to the dying man than the life-blood ebbing from his heart, her efforts as much as his own might have contributed to its acquisition, and justice as well as affection might vindicate her claim to it—and yet she might be left in hopeless destitution.

Such would be the consequences were the disposition of estates left wholly to the statutes of descent and distribution.

But there are remedies provided against these evils—and what are they?

1. *The statute of wills*, by which property may be disposed of according to the judgment and affection of the owner, so as to take it out of the operation of the statutes of descent and distribution.

2. *Marriage Contracts*—by which the same result in a large class of cases is as effectually attained.

Indeed, it may well be doubted whether there is not as great a necessity for allowing and upholding marriage settlements as there is for a statute of wills.

What is the condition of a woman becoming a wife, in respect to property? Every dollar of her personalty becomes instantly her husband's. A life estate in her realty is immediately vested in him, though no issue be born of the marriage—and if she die during the coverture, she has no power on earth to provide for the pressing wants of a relative, unless she has a marriage contract that enables her to do so. How necessary for *her*, then, is such a contract.

But let us see what is a man's condition. The moment he marries, his wife becomes entitled to dower in his real estate, however little she may need it—however much his interest, his affections, or his duties may require it to remain unincumbered. Of all his personalty, however great, if he die without issue, she surviving, she becomes absolute owner in despite of any will or testament he can make. She may have an ample fortune with-

out it, while his relatives are destitute of bread, and yet she takes it all, all to the very last penny. The very mother that bore him may become the inmate of a poor-house for want of support—yet the widow takes all. How necessary for him, an ante-nuptial contract.

The plaintiff's counsel argued at bar as if it were the duty of a man, on taking a wife, to crush out of his heart every affection for any one else; to forget father, mother, brother, sister, friend; and that however great may be his fortune, and however amply he may provide for his wife, every dollar he gives to another is just so much of which she is *robbed*. And the statutes of descent and distribution were appealed to as furnishing the sole rule of morality in the disposition of a decedent's estate, as if there were no such thing as a statute of wills, or a valid marriage contract, or as if the whole code of morals and of the affections were embraced in the statute law.

On further reflection, the learned counsel have started, in their printed argument, another theory. They think it right enough, nay, favored by policy and the law, for a man to give away his estate while he lives, though he may thereby leave nothing for the statutes of descent and distribution to operate upon; but to do so by will, is, in their opinion, a crime against both morals and the law. The former course, they tell us, deserves encouragement because it prevents hoarding; the latter deserves reprobation, because it promotes avarice. But they fail to tell us *at what age* a man should begin to part with his property; whether, relying on the Scriptures, he should await the approach of three score and ten, or, looking into the bills of mortality, should begin the good work at an earlier period, or, observing how many strong men are cut down in their youth, he should wisely distribute as fast as he makes. It would certainly aid us greatly in the discharge of our moral duties, as seen by the learned counsel, had they condescended to be a little more definite.

But as it is, I am obliged to them for the concession, that Mr. Ross might lawfully and morally have given away in his life the property he disposed of by his will; for if that be so, as it certainly is, what right has the plaintiff to complain? He has

deprived her of nothing that he could not have given away before he died; in other words, he has deprived her of nothing to which she had a *right.*

II. The ante-nuptial contract being *prima facie* valid, the burthen rests upon the plaintiff to show that it is invalid.

To do this, what is necessary?

1. To aver facts that invalidate it.
2. To prove the averments.

Neither averments without proof, or proof without averments, will suffice. There must be both; and this is as much a rule of code as of chancery pleading. Thus, if fraud be relied on, it must be alleged, and the particulars of it set forth. And so of undue influence; it must be shown to have existed, and also to have been exercised to procure the instrument.—*Sullivan* v. *Sullivan,* 21 *Law Rep.* (*January,* 1859) 531, 545, *and cases hereinafter cited.* I do not pretend that there are any technical terms whose use is indispensable, as, for instance, "undue influence." I am willing to admit the proposition of plaintiff's counsel, that, "a detailed statement of circumstances, from which undue influence or incompetence is *necessarily* inferable, is sufficient as an averment in equity;" but the inference must be a *necessary* one, not one that merely *may* be drawn. For "all acts are presumed to be rightly done," and all persons presumed to be innocent, until the contrary clearly appears; and hence, where there may be contrary inferences, that which upholds is preferred to that which destroys.—*Broom's Max.* 729; *Greenleaf's Ev., Secs.* 34, 35, 80; 10 *Coke's Rep.* 56.

And there is nothing in the code that relieves a party from the necessity of properly stating his case. The chapter referred to by counsel has no such effect; it merely permits variances to be cured. But an omission of indispensable averments, is not a variance; it is a failure to state a cause of action.

We are thus brought to inquire—

1. What facts are averred to invalidate the contract?
2. Are they sufficient?
3. Are they proved?

Now, I confidently affirm, that there is not a single fact averred in the plaintiff's pleadings to show that the ante-nuptial contract is invalid.

There is no averment that it was obtained by

Duress, or

Fraud, or

Undue Influence,

Or, that it was not reasonable.

Nor are facts stated from which either is a *necessary* inference.

Of duress, which in legal parlance is bodily restraint, or well grounded fear of bodily harm, it is, of course, unnecessary to say anything, for no such thing is pretended.

As to fraud and undue influence, there is not a word in the Petition in respect to either, and so far is the Reply from setting up any such thing, that it admits directly the contrary.

For it is expressly averred in the Answer, that, "in making and concluding said contract, no unfairness was practiced by Mr. Ross towards the plaintiff, and no advantage taken of her in any respect, and it was entered into by her with full knowledge of its nature and effect." No denial of these allegations, or of either of them, is made in the Reply, and, therefore, by the express provision of the statute, they are to be taken as admitted.

And, in respect to the *reasonableness* of the contract, there is not a word of averment that it was unreasonable, nor a fact stated from which any such thing can be inferred. For there is not one word in the pleadings to show the *extent* of Mr. Ross' fortune at the date of the contract. What he was worth ten years afterwards, namely, at his death, is averred; but for aught that appears in the pleadings, he may not have been worth $10,000 at the date of the marriage. That he had "considerable" property, is shown by the answer, and also by the contract itself; but they show the very same thing in respect to the plaintiff. The extent, however, of the fortune of either, is not averred, and, for aught that appears, the plaintiff was as rich as he.

But we have a sort of historical romance, set up in the Reply, from which it may be said that something, I don't know what, ought to be inferred that invalidates the contract. We are told of a previous courtship, a former engagement, its being broken off, a second engagement on July 12, 1847, and then the Reply proceeds:

"A few days before the date of the ante-nuptial contract, Mr. Ross introduced that subject and proposed the terms. The subject was unpleasant to the plaintiff, for the proposition came at a time when the engagement had become known and arrangements for the marriage were in progress, *so that* the plaintiff was under a constraint to submit to any terms rather than endure the mortification of a second rupture."

And this is positively the whole of the ground alleged for setting the contract aside.

Now, in the name of the law, I ask, to what class of things, fatal to a contract, does this matter belong?

It is not *duress*, for that is bodily restraint or fear.

Is it fraud? Must every ardent young lover, at the same moment in which he avows his passion to his Laura, before he has risen from his knees, and while the tears of joy are in his eyes, and the blushes are on her cheek, begin to chaffer about a contract, or be forever precluded from making one? Or, if it is Laura who desires a settlement, must she, the instant after a faintly whispered "yes," to her lover's fervent prayer, assume a business-like tone, and straightening herself up, say: "But, sir, I want to know your terms. How much do you propose to give me? What property of mine do you propose to let me keep? Here, sir, are pen, ink and paper, down with your terms. The matter must be arranged *now*, for if you go away before doing so, and tell any one of our engagement, it will be too late to talk of a marriage contract. You would then be under a constraint to accept any terms I might propose for fear of the mortification of a rupture, and so any contract you might make with me would be set aside, on the ground of my fraud."

Is it *undue influence*?

What is *undue influence*?

It is not the influence that properly belongs to, or results from,

kindness or affection. Such an influence is legitimate — nay, it upholds transactions that without it could not be upheld. It is no objection to a contract, gift, or devise, that it was induced by affection. Natural love and affection is a sufficient consideration to support any gift or grant. Even in the case of a wife, *sub potestate viri*, making a gift of her own estate to her husband, it is sufficient. *Hardy* v. *Van Harlingen, supra. A fortiori* is it sufficient, when the parties are *sui juris?*

If I grant an estate to a stranger for a grossly inadequate price, that fact, coupled with other circumstances, may raise a presumption of fraud, and avoid the deed. But if out of affection for a friend, though in no wise related to me, I grant it to him for a twentieth of its value — nay, give it to him — the grant is good.

Affection then sustains, instead of destroying, contracts; and if the plaintiff, out of affection for her intended husband, accepted a provision, which, with less affection, she would have rejected, this circumstance, instead of invalidating, upholds her agreement.

But undue influence is quite another thing. It is that dominion of one person over another, sometimes seen, that leaves no free will — that obliterates reason, silences duty, counteracts affection, destroys the sense of obligation, and makes its victim the mere passive instrument of his master's volition. And hence it has been aptly enough called "moral duress."

In 1 *Williams on Executors, page* 42, it is said: "But the influence to vitiate an act must amount to force and coërcion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coërcion; by importunity that could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear." And see *Williams* v. *Goude*, 1 Hagg. 581.

In the American notes to the same work is the following:

"It may be gathered from the able opinion of Mellen, C. J., in this case, (*Small* v. *Small*, 4 *Greenleaf*, 220,) that no matter what the character and amount of influence exerted on the testa-

tor during his lifetime and antecedent to the making of the will, the instrument will still be upheld, provided it appears that such influence was general, and arising at all times, not exerted particularly in relation to the will in question, but acting constantly upon the feebler will of the testator with that prevailing force which a strong mind and determination ever exercise over a weak one." 1 *Williams on Executors* [41] *note g.*

And Greenleaf says: "But it is said that undue influence is not that which is obtained by modest persuasion, or by arguments addressed to the understanding, or by mere appeals to the affections; it must be an influence obtained either by flattery, excessive importunity or threats, or in some other mode by which a dominion is acquired over the will of the testator, destroying his free agency, and constraining him to do, against his free will, what he is unable to refuse." 2 *Greenleaf's Ev., sec.* 688.

Undue influence is most frequently spoken of in treating of wills; for it is in respect to them that the question of such influence most frequently arises. But the thing is the same whether the instrument be a will or a contract. No distinction between the two is to be found in the books. On the contrary, Judge Story, speaking in express terms of contracts obtained by undue influence, and putting cases by way of example, gives the reason why the party is not bound in the following words: "For, in cases of this sort, he has *no free will*, but stands *in vinculis.*" 1 *Com. on Eq., sec.* 239.

Very far, then, from undue influence is simple affection, and further yet is a mere desire to avoid an ill founded mortification—a mortification where all the blame would fall on the wrong doer, and all the sympathy be on the side of the wronged.

And it is also to be remembered, that to set aside an instrument, it is not sufficient to show *general* undue influence, but it must be shown that such influence was *specially exerted to procure the particular instrument.* See authorities supra.

It is hardly necessary to remark that there is not one word of either allegation or proof of any such special exertion in this case.

I am well aware it may be said that a lesser degree of influence,

coupled with other damaging circumstances, may prevent the specific execution of a contract, than would be necessary to justify its being set aside, and I shall hereafter consider the case in that point of view. In the meantime, however, I remark, that in both cases the nature of the thing (the undue influence) is precisely the same; that it is never in any case to be confounded with affection; and, whether the question be upon executing or avoiding a contract, it must distinctly appear that the instrument was not the free will of the party.

But how is the fact? Had the engagement become known before the contract was proposed? Upon this I observe—

1. That the Reply does not so state unequivocally.

2. That the burthen of proof is on the plaintiff, and she has not adduced a particle of testimony of any such thing.

3. That the testimony shows the contrary.

I shall not repeat what has been said by my associates on this head, but will confine myself chiefly to a correction of some very glaring errors of the plaintiff's counsel in respect to it. They say: "The fact that the actual verbal engagement had taken place before the ante-nuptial contract was *proposed*, is proved by the testimony of Mr. John Dun and the date of entry in the books of Messrs. Thurman & Sherer, connected with the testimony of her sister and aunt."

Now, the sister, Mrs. Beech, did not testify to a word about the contract. She only stated when she was told of the engagement. Her testimony, therefore, throws no light upon the question, when was the contract proposed.

But the testimony of the aunt, Mrs. McLandburgh, does; and shows very satisfactorily that it was proposed at the very time of the marriage engagement. For she testified that the first she knew of the engagement was from Mr. Ross, and that, at the same time, he told her in detail what had been agreed between him and Jane in respect to their property. This, said she, was "a day or two previous to July 14th," and she was enabled to fix the date with certainty by reference to certain store bills. It was as early then as the 12th, or at most the 13th, of July. But the

marriage engagement took place on the 11th or 12th of July—the Petition says, the 12th. So, it was the very day of, or the day after, the making of the engagement, that Mr. Ross told Mrs. McLandburgh of both the engagement and the agreement. Can there be a doubt, then, that both were arranged at the same time? Let it be remembered that these were old people, and that a marriage between them was, to a great extent, a matter of simple convenience; that a marriage contract was, under the circumstances, eminently proper, and would naturally be thought of; that the parties were both business people and had long known each other; and that for them, under the circumstances, to make their engagement and property arrangement at the same sitting, was neither unnatural or indelicate; however strange such a transaction might seem between youthful and ardent lovers. Let these things be borne in mind, and I hazard nothing in saying that no one can believe that Mr. Ross, at his time of life and with his estate, and with a certainty that there would be no issue of the marriage, would ever have engaged himself to the plaintiff without an understanding in respect to the property of the parties. Very few sensible men would, under such circumstances, have done so; certainly not as clear headed, practical and upright a man as was Mr. Ross.

The plaintiff's counsel, seeing the force of Mrs. McLandburgh's testimony, labor hard to avoid it, and, in doing so, fall into the great error of stating that she testified that "Ross told her that there was a *written* agreement between him and Jane"—whereas the fact is, she said not one word about its being in writing.

Having fallen into this error, they next imagine that there must have been *two* conversations, and that it was in the latter, and after the *execution* of the contract, that Mr. Ross stated the agreement to the witness—whereas the whole ground of this hypothesis is at once removed by the fact that the witness did not speak of a *written* contract; and, in addition to this, it will be remembered that she was exceedingly clear in her recollection that she heard of the engagement and the agreement at the same time, and that, when Mr. Ewing sought to demonstrate, in his speech, that she was mistaken as to the time, she unhesitatingly and positively assured him that she was not. Nor is there any, the least,

likelihood that she was. There can be no doubt that Mr. Ross contemplated a marriage contract as well as a marriage; and I have shown, I think, that all the probabilities are in favor of the idea, that both the engagement and agreement were settled at the same time. And thus being settled, nothing was more natural than that, when he mentioned the one to as intimate a friend as Mrs. McLandburgh and a relative of Miss Welsh, he also mentioned the other. And it would be very strange for the memory of the witness to become confused about a conversation that so much interested her; for, in the intimate relation she held to both the parties, she must have felt the strongest interest in what she heard, and it was likewise fastened in her memory by the fact that it took her wholly by surprise, as she had long entertained the belief that they would never get married. Under such circumstances, there are few women whose memories would be at fault — certainly not a woman with the marked vigor of intellect of Mrs. McLandburgh.

But had Mrs. McLandburgh spoken of a written contract, it would be much more reasonable to suppose that she did so under an erroneous impression that the agreement had been reduced to writing, than that she should be mistaken as to the time and details of the conversation which she fixes by so many certain marks. Mr. Ross stated to her the particulars of the agreement, and it would not have been strange had she thence inferred that it was in writing: but it would be very strange, under the circumstances, for her to be mistaken as to the time of the conversation, or rather for her to confound two distant conversations and blend them into one. But it is of no use at all to speculate about this. The testimony is our guide, and that is clear and positive. The witness did not speak of a written agreement, and she did affirm, and repeat it, that there was but one conversation on the subject, and that that took place "a day or two previous to July 14th." And this date she fixed by infallible data. This leaves no room at all for any speculation.

As to the testimony of Mr. Dun, and the entry in Thurman & Sherer's book, they prove what is shown by the contract itself, that it was not *executed* until after July 15th; and this is

all that the plaintiff can claim from them. But they are potent evidence for the defendants, since they powerfully corroborate the testimony of Mrs. McLandburgh. Mr. Dun states, that, at *the same time* that Mr. Ross communicated to him his marriage engagement, he placed in his hands a paper, desiring him to copy it, and hand the copy to Mr. Thurman for his legal opinion; and, in the same conversation, told him *what property he was to settle on his intended wife.* Mr. Dun accordingly made and handed the copy to Mr. Thurman, and Mr. T. prepared a written opinion, which he handed to Mr. Dun, who paid him for it. This payment, as appears by the books of Thurman & Sherer, was on July 15th — not over three or at most four days after the making of the engagement. Now, it is fair to presume, that, inasmuch as Mr. Dun had to copy the paper, and call on Mr. Thurman, and Mr. T. took time to prepare a written opinion, the conversation between Mr. Ross and Mr. Dun took place several days before the 15th. The probability is, that about the same date that Mr. Ross told Mrs. McLandburgh about the engagement and agreement, he also communicated them to his intimate friend, Mr. Dun. It is thus manifest, that the terms of the agreement were understood several days prior to the 15th, according to Mr. Dun's testimony; several days prior to the 14th, according to Mrs. McLandburgh's — in a word, they were contemporaneous with the engagement. Mrs. McL. testifies positively, that Ross told her that he and Jane had agreed about their property; and the testimony of Mr. Dun is to the same effect. For how could Ross have told him, prior to the 15th, what property Jane was to have, and set about getting the necessary legal advice in reference to a contract, unless such an agreement had been made? *And why did he state an A. and B. case for Mr. Thurman's consideration, if his engagement with the plaintiff had become public, as is pretended in the Reply?* It won't do, in the face of this testimony, and in the total absence of countervailing proof, to say, that this was all done without consulting Jane; that there was no agreement between her and Ross; and that the latter did not deem it necessary to consult her, because he knew that his influence over her was such that she would readily assent to anything

he might propose. This theory is in direct antagonism with the testimony of Mrs. McLandburgh, with reasonable probability, and with the plaintiff's Reply. Mrs. McL.'s testimony proves that Jane had not only been consulted, but had agreed to the terms. The reasonable probability, from the testimony of Mr. Dun, and the character and situation of the parties, is to the same effect. And the Reply, instead of asserting that the plaintiff was under any such dominion of Mr. Ross, that he could make her assent to whatever he wished, charges (if the charge amounts to anything), that it was fear of public mortification, and not any influence of his, that induced her to assent to the contract.

Indeed, may it please your Honor, the whole rose-colored literature of this case is a mere piece of fancy. These parties were first engaged many years ago. For a very sufficient reason—because his health forbade marriage—he offered to release her from the engagement. The offer was made when he was stretched on a bed of sickness, from which he had no assurance he would ever rise. It was made through the medium of a mutual and most respectable friend; in what terms of kindness, we don't know, for the plaintiff has not seen fit to produce Mr. Coburn's letter. It was assented to by her without, so far as appears, a single murmur, or even a pang. Certain it is, the conduct of Mr. Ross could not have been considered in the least degree dishonorable, for he retained the esteem and friendship, not only of the plaintiff, but of all her relatives and friends. And if it be said that she was so submissive as to kiss the hand that smote her, there is no reason to predicate such irrational humility of those with whom she was connected. They, at least, were not under his dominion; her brothers and her intelligent and high-minded aunt were not insensible to what touched the honor or the feelings of their sister and niece; and whatever she might have been willing to endure at his hands, they would never have held in the bonds of friendship the man who had wronged and insulted her. But her counsel are not so forgiving. What she and her family have ever acquiesced in with every appearance of contentment, excites in their minds the liveliest indignation; and their imagination, somewhat robbed of its lustre by a professional bias, revels in the idea of what a

nice breach of promise case they would have had but for the want of spirit in their client.

We have next another fancy sketch, in which Mr. Ross is represented as a dog in the manger, unwilling to marry Miss Jane himself, and frightening off all other suitors for nearly a quarter of a century. I don't know what reliance counsel place in the love of the marvelous, but without some such explanation, I am wholly unable to comprehend the exhibition of this picture. To a plain man like myself, who uses his natural eyes, and sometimes looks into the census returns, it does not seem necessary that there should be a Mr. Ross in order that there should be an old maid. I have always supposed that some women were maidens because they could not get husbands, and that others were such because they had the good sense to prefer a single life to an ill-assorted marriage; but a case of forced maidenhood, such as is here presented, I have never known or heard of, and without better proof than this case affords, I must be allowed to deny its existence—I might say, its possibility.

But out of these materials the inventive genius of counsel has drawn a portrait of their client as an embodiment of supernatural meekness, humility and devotion; and what is stranger yet, the object of these exaggerated affections was, according to the same limners, the dryest, hardest, most selfish and insensible old miser that ever tied a purse. And to make the contrast yet stronger and our astonishment still more profound, he was nearly or quite old enough to be the father of the lady when first he bound her in his magic chains.

Now, may it please your Honor, there is no foundation in a court of justice for all this poetry. It might serve well enough as the groundwork of a tale of fiction, but it has no place here. Mr. Ross never wronged Miss Welsh; he was quite incapable of that. Their first engagement was mutually and honorably dissolved, and, for reasons that were satisfactory to themselves, and that we neither know nor have a right to pry into, it was not renewed until late in life. When it was renewed, they had long since ceased to be moved by the romantic impulses of youth, if indeed they had ever been so moved. Their former love had settled down into

a quiet and solid friendship, which made the company of each agreeable to the other, and a marriage was the natural result. But no issue was or could be expected from it, and they mutually looked to their own relations as the recipients of their ultimate bounty. It would have been unjust in him to deprive her relatives of her property, and they had no right or claim whatever upon his. Hence a marriage contract—a contract that left to the wife her own means, with all its increase, and provided for her an ample support for life out of his, leaving the residue of his fortune to go to his kindred, if so he should will it, as her fortune would assuredly go to hers. This is the plain case, stripped of the romance that has been thrown about it—a case that requires no marvelous devotion, no undue influence, no saint, devil, magician, or bewitched damsel, to account for everything that took place.

The gravamen of the plaintiff's charge is, that the engagement had become known before the contract was proposed, whereby she was under a constraint, &c. She makes no proof whatever of this allegation, and it is successfully disproved. Indeed, there is no evidence that even at the date of the *execution* of the contract, the engagement was known to any person but the parties themselves, her relatives, and Mr. John Dun.

But suppose it was known before the contract was proposed, it yet remains to inquire—

1. Did that fact cause her to agree to the contract?
2. If it did, is it sufficient to invalidate it?

As to the first of these questions, I remark:

(1). That it is not averred in the plaintiff's pleadings that she was induced to agree to the contract, or even influenced, by any such consideration. The Reply is studiously ambiguous, equivocal and evasive on this subject. It is in these words: "A few days before the date of the ante-nuptial contract, Mr. Ross introduced that subject and proposed the terms. The subject was unpleasant to the plaintiff, for the proposition came at a time when the engagement had become known, and arrangements for the marriage were in progress, so that the plaintiff was under a con-

straint to submit to any terms rather than endure the mortification of a second rupture."

Now observe, it is here said that the "*subject*" was unpleasant to the plaintiff, but it is not averred that she was *dissatisfied* with the *terms* proposed.

Again: She says that she "was under a constraint to submit to *any* terms rather than endure the mortification of a second rupture." That is, she *would have submitted* to any terms—not that she *did submit* to the terms in question *for any such reason.*

(2) The thing to be avoided was the mortification of a second rupture. But there is no averment or proof that such a rupture would have occurred, had she desired better terms; nor that Mr. Ross would not have made a more liberal provision, had she requested it. And if it be said that her delicacy forbade such a request in person, what was there to prevent its being made by her brother or a friend? Why, then, I ask, if she was dissatisfied with the terms, did she not communicate her dissatisfaction, as, in honor and in justice to Mr. Ross, she was bound to do?

But, according to the Reply, nothing of the sort was done. She kept, it is said, the terms of the proposition a profound secret, and, days after it was made, executed the contract that embodied it, upon the strength of her own judgment, without consultation, and without the slightest expression or appearance of discontent.

If this was so, the inference is irresistible that she felt the terms to be just and was satisfied with them. Why, was she willing to marry a man who she thought was so dishonorable that he could propose unreasonable terms to her, and require her acceptance of them under the penalty of forfeiting his marriage engagement? Was this the opinion she entertained of Mr. Ross? If so, why did she marry him at all? Why ally herself to injustice and dishonor? And what sympathy is she entitled to, if she married a man of whom she had such an opinion? But she believed no such thing. She knew his uprightness, she knew his honor, she knew he was incapable of acting unjustly towards her, and she knew that his proposition was not unjust.

She knew with what economy he had lived, with what economy she had lived; that neither of them contemplated a different life in the future, married or unmarried; that no children would come of the marriage; that all he owed her, if she married him, was a comfortable subsistence for life; that she needed nothing more; and that anything he gave her beyond this, would be simply diverting his property from his own relatives to give it to hers, whom he was under no obligation to provide for—for he proposed to marry her, and not the whole family of the Welshes. She knew all this, and she knew that by marriage she would, on the terms proposed, be relieved from all expenses and allowed to accumulate the increase on her own property, so long as he lived, and be amply provided for out of *his* estate, if she survived him, for the remainder of her life; and she knew that this was all she had a right to ask; and it was all. She agreed to the contract then, not because of the equivocally intimated, but not asserted, apprehension of the Reply, but because she knew it to be just. And if she did apprehend any dissatisfaction on his part, if she expressed dissatisfaction with it, it was because she felt that he would have a just right to be wounded with her ill founded discontent.

(3) But suppose it was not so—suppose that she acquiesced in the contract to escape the mortification she speaks of—does that invalidate the contract?

I answer, No.

Why is it to be tolerated, that after a woman at least 49 years of age, sharp, shrewd, intelligent, and accustomed to business, has executed a contract without a murmur, without the least sign of repugnance or dissatisfaction, a contract that she had had days to ponder over before she signed it; after she has done this without intimating to either lover, relative or friend, a desire for a more ample provision, and without any well or ill founded apprehension, so far as is shown, of a rupture of her engagement if she did so; after she has thus suffered the man to marry her in the security that she was satisfied; after she has suffered him to live in that security for ten years, never doubting the validity of her contract or her faithful adherence to it; after she has fortified that

security by accepting a more than ample compensation for the property settled on her, and joined him in conveying that property to others, and accepted from him also a valuable gratuity in the shape of new buildings on her own estate; after she has suffered him to die in this security without having provided in his lifetime for a single being of his own blood—as he might and no doubt would have done had he doubted her good faith—after all this, shall she be allowed to put on airs of extreme sensibility and morbid delicacy of feeling, and tear from the blood kin of her husband the fruits of his long and laborious life, not to minister to her own wants, but to enrich her relations and hangers on—and this upon the ground that she *apprehended* a *mortification* which she never expressed, never intimated, never took any pains to verify or to obviate, and which, if it was ever felt at all, was in all human probability wholly imaginary? Are solemn contracts, relied upon in life and in death, to be set aside, the objects of a man's whole life of economy and toil to be frustrated, the near and dear relatives of his blood to be disinherited and his estates divided among strangers, upon such a figment as this?

But it is argued with great earnestness that the contract was *unreasonable*.

In answer, I have to say:

1. That no such issue is made by the pleadings.
2. That the contract was reasonable.

In support of their point, counsel cite *Stilley* v. *Folger*, in which case the Court used the following language: "Indeed, we think it may be considered as well settled, at this day, that almost any *bona fide* and *reasonable* agreement, made before marriage, to secure the wife in the enjoyment *either of her own separate property*, or a *portion of that of her husband*, whether during the coverture or after his death, will be carried into execution in a court of chancery." (p. 649.) And again: "It is said in this case, the provision made for the wife is *so much* less than the value of one-third part of the husband's lands, that it would be unreasonable to permit the agreement to operate as a bar. There is not, however, with the proofs, anything satisfactory to show the

value of the *real* estate of the husband, or of which he died seized; and, without such evidence, no such deduction can be legitimately drawn." (p. 650.)

Upon this I have to remark:

1. That it appears by the extract last quoted, that the question, whether the provision must be reasonable, was not before the Court, for there was no proof to raise that question.

2. That the remarks of the Court relate to a relinquishment of *dower* only. For,

(1) The case before the Court was for dower only. (2) There is a manifest and most material difference between dower and distribution. By marriage a woman becomes entitled to an inchoate right of dower in all the estates of inheritance in lands of which her husband is, or may be, seized during the coverture—of which right she cannot be deprived without her consent. But to his *personalty* the marriage gives her no right, perfect or inchoate. His dominion over that is absolute, notwithstanding the coverture; and he may give or gamble away every cent of it, not only without her consent, but against her will. Or he may convert it all into *realty;* or he may remove to a State whose laws of distribution give nothing to a widow. The consequence is, that the value of his personalty can never be taken into account to show that an ante-nuptial contract is unreasonable.

(3) It cannot, for a moment, be supposed, that in order to be reasonable, the provision made by the contract must be equal in value to what the wife would take by the statute, in the event of her surviving her husband. For,

(a) That would make an ante-nuptial contract practically useless. If the intended husband must give what the law would give, where is the use of a contract? If, for instance, in a case like this, where it is certain the man will die without issue, he must give the value of *all* his personal estate, what benefit could there be in an ante-nuptial contract?

(b) Such a doctrine would deprive parties competent to contract of the power to say what the one should give and the other receive, and would thus be a restraint upon the power to

contract and a discouragement to marriage—both which are opposed to the policy of the law.

(c) Such a doctrine would set up an *impracticable* standard. For the contract must be valid *when made*, or never valid. But if its validity depends upon the provision being equal to what the wife would take in the event of her survivorship, how can such a contract be made, *when neither of the parties can tell what the husband may be worth at his death*, or *in what* his property may consist. ?

(d) Such a doctrine is unsupported by a single authority, and is opposed by a multitude. See, among others, the following cases, in all which the contracts were held to bar dower or distribution :

Davila v. *Davila*, 2 Vern., 724, in which the husband received by the wife £1,000, and covenanted that if she survived him, she should have £1,500 out of his estate. So he gave her but £500 contingently.

Andrews v. *Andrews*, 8 Con., 79, in which there was no provision for the wife, except to do some carding and weaving for her.

Sellick v. *Sellick*, ibid., 85, note, in which the value of the estate was $6,000, the provision for the wife only one-sixtieth part of that sum—namely, $100.

Gelzer v. *Gelzer*, 1 Bailey Eq., R. 387, in which there was no provision for the wife, the consideration of her covenant being the marriage only, and the nominal sum of one dollar.

Cannel v. *Buckle*, 2 P. Wms. 242, in which there was no provision for the wife.

Vizard v. *Longden*, (cited in 3 Atk. 8, and 2 Eden, 66,) in which the provision for the livelihood and maintenance of the wife was but £14 per annum.

Where the woman is an infant at the time of entering into the contract, courts of equity will, in general, scrutinize it, to see that it is reasonable, before enforcing it; but when she is an adult, and, therefore, capable of contracting, the marriage itself is a sufficient consideration to support her covenant, and she will be

barred, though no provision at all be made for her. This distinction runs through all the cases, and is recognized by all the text writers on the subject. In the argument of *Stilley* v. *Folger*, Messrs. Storer & Gwynne truly said, (pp. 632, 633): "We feel justified in the conclusion, that wherever there is a contract by a female, competent to contract, to accept anything in lieu of dower, courts of equity will act upon her conscience, and by virtue of their power to enforce the specific performance of contracts, will compel her to abide by her bargain. The adjudged cases and the text books bear us out in the assertion. In 4 Dane's Abr., c. 130, art. 5, secs. 20 and 21, an adult woman is said to be barred by her acceptance of any provision, however small and precarious; in 1 Cruise's Dig., 226, by her acceptance of any provision; in 1 Clancy, on Husband and Wife, 220, 1, 2, 3, by her agreement to accept any provision, however inadequate and precarious; in 1 Roper, on Husband and Wife, 476, 480, 481, by any terms to which she may think proper to agree before marriage. To the same effect is 1 Mad. Chy., 355; Powell on Contracts, 53."

So, in *Prebble* v. *Boghurst*, 1 Sch. and Lef. 319, Lord Eldon said: "A part of the consideration, besides these pecuniary benefits, is marriage. *I do not apprehend that the quantum of pecuniary benefit will affect the question; and I am surprised to find observations about the amount of the penalty, as varying the reciprocity, where marriage is one of the considerations.*

But, say the plaintiff's counsel, *Stilley* v. *Folger*, until reversed, binds this Court, and that case decides that the agreement must be reasonable. Certainly, what was decided in that case, is binding authority here; but I have shown that no such point was decided. What was said about reasonableness, was a mere *obiter dictum* of the Judge who delivered the opinion. He casually used the word "reasonable," and upon this fortuitous use of a word, the plaintiff's counsel build their argument, in opposition to an unbroken chain of authorities, English and American.

But I have no need to quarrel with the *dictum*, provided it be

not perverted to mean what the Judge uttering it never intended. What did he intend, assuming that he had a fixed idea, in using the word "reasonable?" Did he mean that the man must make provision for the woman out of his own estate, and that such provision must approximate what she would be entitled to by the statutes of descent and distribution, in the absence of a contract? This is what the learned counsel are obliged to assume; but so far is it from being warranted by the language of the Judge, that that language gives it an unqualified negative. For the Judge does not require that any provision be made out of the husband's estate. It is sufficient that it be made out of hers. His language is:

"Indeed, we think it may be considered as well settled, at this day, that almost any bona fide and reasonable agreement, made before marriage, to secure the wife in the enjoyment, *either of her own separate property*, or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery."

So, according to this very passage, on which the counsel found their reasoning, the husband's estate may be wholly laid out of view, and, of course, the extent of it furnishes no rule for determining whether the agreement is reasonable or not. Was it reasonable in the plaintiff to marry Mr. Ross, with a contract securing to her for life a much more than ample provision for her support? If it was, the contract is binding, according to the language in *Stilley* v. *Folger*, and would have been equally so, had Mr. Ross owned the national exchequer. And why not? Why should not parties *sui juris*, and competent to take care of their own interests, knowing best their own wishes, their own necessities, the demands of their own happiness, and what each is reasonably entitled to ask of the other, be allowed to make their own bargains? What principle of justice or public policy steps in to forbid an adult woman, who, before marriage, has no claim whatever on the estate of her intended husband, from saying with what part of that estate will she be content? What adjudication forbids it?

The plaintiff's counsel argue as if the plaintiff, by the ante-

nuptial contract, gave to Mr. Ross $50,000 *of her own money* for a grossly inadequate consideration. They wholly forget that she had at that time no $50,000 to give; that the $50,000 they speak of belonged not to her but to him; that she could not acquire even a possibility of inheriting it without a marriage; that a marriage even would give her no title, actual or inchoate, to a dollar of it; and that notwithstanding the marriage, he could give every cent of it away, or convert it into wild lands, in which dower would be valueless.

In the total absence of any case that even tends to support their theory of a reasonable contract, the learned counsel are forced to rely on *Gould, Executor of Hayes*, v. *Womack and Wife*, 2 Ala. Rep., N. S., 83; although that case, for reasons that are perfectly clear to the attentive reader, and as the counsel themselves in effect admit in another part of their argument, in no manner whatever tends to support their proposition. That was a case of *dower*, in which an ante-nuptial contract was set up as a bar; and the question was, not whether the contract would not have been a good bar elsewhere than in Alabama, but whether, *in view of the statute law of that State*, it was a bar. The Court held that it was not; the ground of the decision, when briefly stated, being, that inasmuch as the legislature of Alabama had not permitted the *legal* right to dower to be barred by a jointure, (there being no jointure act in that State,) a court of equity could not set up an ante-nuptial contract as a bar, unless its provision for the wife was something like an equivalent in value to what would be her dower. Indeed, considering that the law of Alabama did not permit jointures, the Court seem to have doubted whether even such a provision ought to be effectual; for, said they, "it is, in effect, saying to a party, you shall do that which the law says shall not be done." But what would the Court have ruled had there been a jointure act in Alabama, as there is in Ohio? Bearing in mind that they speak of jointure as an "ante-nuptial contract," (as it is where acceptance is necessary,) let them answer for themselves. On page 92, after stating the rule in respect to the specific execution of ordinary contracts, "that a court of equity will not lend its

aid to enforce a specific performance of an executory contract, unless it is just, reasonable in all its parts, and founded on adequate consideration," they proceed as follows: "This is doubtless the general rule applicable to the class of contracts of which we have been speaking, [that is ordinary contracts,] when sought to be enforced in chancery. *As to the particular kind of contracts now under discussion, it has already been shown, that in those countries where the widow is authorized to bar her right to dower at law, by an ante-nuptial contract,* courts of chancery, which look at the substance of things, and disregard form, will decree a specific performance, *in cases where the provision is inadequate, if it does not entirely fail,* because such was the intention of the parties—an intention which the law authorized to be carried into execution, which the parties intended to execute, and failed to accomplish, by the omission of some form. These cases, therefore, are, in these courts, *excepted from at least one of the rules which enter into the consideration of other contracts, coming under the same general head. In this particular class of cases, mere inadequacy of consideration, though such a prominent objection in other cases of executory contracts sought to be enforced, is not of itself sufficient to prevent its execution by the Court.*"

The Court afterwards advert to the rule hereinbefore alluded to, that the jointure that bars an infant of dower must be reasonable, inasmuch as, owing to her infancy, she cannot bar herself *by contract;* and then they hold, that as *all* women in *Alabama,* adults as well as infants, are equally disabled in this particular, the rule, *in that State,* applies to *all.* They say, page 97: "The result of the cases is, that even where dower may be barred at law, when, in the case of infants, the court of chancery is called on to enforce a marriage contract, it will not interfere, unless the contract is just, fair and reasonable, on the ground that they are not bound at law. This being the case, where dower may be barred at law, by an ante-nuptial contract, and where, by analogy to the statute, a court of chancery, disregarding form, and looking only to the substance, *will enforce any contract which an adult female may make prior to marriage, with the intention of bar-*

ring her dower, NO MATTER HOW INFERIOR TO HER DOWER, yet, *in this State*, where there can be no legal bar to dower, and where an ante-nuptial contract can only be enforced in chancery, as any *other* contract which the Court may be called on specifically to perform, its aid cannot be had unless the contract is fair, just and reasonable, in all its parts, even if there be neither fraud nor misrepresentation, mistake or surprise, or if the inadequacy be not so great as to be of itself evidence of fraud. Indeed, it may well be doubted, whether this is not carrying the jurisdiction of the Court to the very verge of propriety, as it is, in effect, saying to a party, you shall do that which the law says shall not be done, and can only be defended on the ground of the peculiarity of the marriage relation, the most important of all contracts, and because the parties cannot be placed in statu quo."

It is thus apparent, that had there been a jointure act in Alabama, the court would have held Mrs. Womack to be barred of her dower, and that it was only because there was no such statute, and that therefore, in that State, marriage contracts stand on precisely the same footing as other contracts in regard to their specific execution, that the court felt bound to let her succeed. They admit, as I have before shown by their own language, (ante, p. 25) that elsewhere marriage contracts are excepted from the rule in respect to adequacy of consideration, and will be enforced, where the woman is an adult, no matter how small may be the provision for her; but in Alabama, for the reasons stated, no such exception is allowed.

Again: Great stress was laid by the court upon the fact that the contract contemplated a *further* provision than that specifically named in it. The court say, page 95: "It appears, however, that the husband did not propose to his intended wife to receive the small amount of property mentioned in the marriage contract, in lieu of dower in his large estate, but held out the idea that he would make a further provision for her. By the terms of the ante-nuptial agreement, the intended wife, in consideration of the slaves and other property agreed to be secured to her, relinquishes all right to his estate, '*except what he may think proper to give her hereafter.*' It is, *therefore*, proper to consider

whether the provision made in the will, pursuant to the expectation thus created, is fair and reasonable."

I need hardly remark that there is no such feature in the contract now under consideration.

Yet, again: The case, and the reasoning and decision of the court, related wholly to *dower*. There is not an intimation anywhere in it, that such a decision would have been pronounced in a case relating to personalty. Marriage gives a right to dower, of which the woman cannot be deprived without her consent, and the court grounded themselves in the outset, on the principle that this right is "highly favored at the common law," (page 94.) But, as I have before shown, marriage gives no such right to personalty, for the husband may, of his own mere will, convert it all into realty, or even give it away, or change his domicil to a place where a widow takes no personalty, unless the husband die intestate; which is the law of England and most of the States.

I have said that the learned counsel themselves admit, in effect, that this Alabama case does not support them; and that I am correct in so saying, I refer your Honor to page 21 of their argument, where they say: "It is true, in cases of marriage contracts, it is not material how unequal they may be as to pecuniary equivalents," &c.

But they are far too astute to let this stand without qualification or an attempt to take this case out of the operation of the rule thus truly stated. They therefore make the attempt, and as I now propose to consider it, I will quote somewhat largely from their argument, to show what it is. They say: "It is true, in cases of *marriage contracts*, it is not material how unequal they may be as to pecuniary equivalents, or whether the settlement be reciprocal, or all on one side, but there marriage is *the* consideration, and all else is incidental and auxiliary; and all parties in interest —the husband and wife, and the issue of the marriage—may set it up in equity, without regard to the pecuniary value of the consideration. But these contracts are family settlements; they are entered into on consultation with friends, and with aid and advice of counsel. But the great distinction between those contracts and this is, that they are marriage contracts, properly so called, ex-

pressed to be entered into in consideration of marriage, while this is no marriage contract, either in name or in fact. Marriage is no part of the consideration on either side, but the money and property covenants of the one are the expressed consideration for the like covenants of the other, and must therefore be fair and equal, like all other money covenants, to enable a court of equity to sustain them. Like the covenant in the case of *Stilley* v. *Folger*, 14 *O. R.* 647, it is an *ante*-nuptial contract merely, and the rule laid down by the Supreme Court of Ohio, in that case, must be applied to it. The court say: 'It must be entered into *bona fide*, with a full knowledge of its consequences, and, under the circumstances, make reasonable provision for the wife, or equity will not permit it to be set up as an equitable estoppel.'

"This is not only in accordance with the reason of the case and with the whole current of authorities, but it is, until it shall be overruled, the law of Ohio, binding on her courts.

"We have a right, then, to enter into the question of the 'reasonableness of the provision,' under the circumstances; *all* other questions going to the validity of ordinary contracts, it is admitted, are open for inquiry. There is nothing, then, to distinguish the application of the rules of equity to this, from their application to ordinary contracts."

The whole of this reasoning rests upon the assumption that marriage was no part of the consideration of the contract in question, because, as the counsel say, it is not so *expressed* in the contract, and also because it was not "entered into on consultation with friends, and with aid and advice of counsel." They cite no authority to sustain this proposition, and I confidently believe that no case whatever can be found, that, in the least degree, tends to support it. I have looked at scores of marriage contract cases without finding one such case, and if one could be found, I am sure that the industry of the learned counsel would certainly have discovered it. Nor is there any thing in the text books that in the least favors the proposition. On the contrary, both judges and text writers uniformly treat marriage as the principal consideration of all such contracts. "*All* marriage agreements," said Lord Hardwicke in *ex parte Marsh*, 1 *Atk.* 158,

"differ from other agreements; for these do not arise from the consideration of a portion only, *but on account of the marriage.*"

As to the *expression* of the consideration, it *is sufficiently shown by the contract that marriage is a part of it;* but were it not so shown, what then? When did it become the law that the consideration of any contract, certain unsealed guaranties excepted, must be expressed in it? Is it not familiar law, that in no contract, except in such guaranties, is it necessary to express the consideration, and that it is only necessary in their case, because of the statute of frauds. (See 3 *Kent's Com.* 121, 122, 123, *margin;* 2 *Parsons on Con.* 294—297 *and notes.*) And even in respect to them, it "is, undoubtedly, the prevailing rule, that, although the consideration be not named as such, if it can be distinctly collected from the whole instrument what it really was, this satisfies the statute." 1 *Parsons on Con.* 297.

"The consideration may be collected from the whole instrument, and may be inferred from its *character* as well as its terms." *Ibid., note* (2).

But in Ohio, and divers other States, even guaranties are no exception to the general rule, that the consideration need not be expressed. See *note, supra,* and *Reed* v. *Evans,* 17 *O. R.* 128.

As to the general rule itself, a citation of authority is surely unnecessary; but as it is very tersely stated in 1 *Parsons on Con.* 355, *note* (v), where he treats of the requisites of contracts, I quote his language: "The consideration, however, need not be expressed in the writing. It may be proved *aliunde*" And see *Tingley* v. *Cutler,* 7 *Con.* 295, and *Powell on Con.* 368. And we have seen, *supra,* that it may be inferred from the *character* of the transaction.

Again: This contract is under seal, which, of itself, imports a *sufficient* consideration, and dispenses with proof of it. If, therefore, marriage were necessary, as a part of the consideration, in order to support the contract, the seal imports that it was a part of it; there being nothing in this legal presumption that is repugnant to the instrument. The burthen of proof, then, is on the plaintiff, to show that marriage was no part of the consideration — and she makes no such proof.

On page 2 of their argument, counsel say: "Marriage was no part of the contract. The parties do not thereby bind themselves to marry, but recite that, 'intending to become husband and wife,' they have agreed," &c.; and hence they infer that marriage was no part of the consideration, but merely the "*cause*" of the contract.

Now, I hazard nothing in saying, that the counsel never saw, and I believe never will see, a contract, in which there was a *covenant to marry*. There are plenty of such contracts set out or stated in the books, and if any one contains such a covenant, or stipulation, I would like to see it. Let us turn to a few of the cases: it would extend this argument unreasonably to refer to many.

In *Cannel* v. *Buckle*, 2 *P. Wms.* 243, a woman "gave a bond of 200*l.* penalty to the intended husband, in which the intended marriage was *recited*, and the condition was, that, in case the marriage took effect, she would convey all her said lands to the husband and his heirs."

Now, mark! counsel say:

1. That the contract in question contains no covenant to marry. Neither did the above bond.

2. That marriage is not expressly stated as a consideration. Neither was it in the bond.

3. That the intention to marry is only a recital. So it was in the bond.

And observe the further parallel: The contract under consideration *expressly* depends upon "the event of [the parties] becoming husband and wife." And so was the bond, "that in case the marriage took effect."

Upon the theory, then, of the learned counsel, this bond was not a marriage contract, nor was marriage any part of its consideration.

But what said Lord Hardwicke, the greatest chancellor England has produced? This: "The impropriety of the security, viz., a bond from a woman to a man whom she intends to marry, *or the inaccurate manner of wording such bond, is not material:* for it is sufficient that the bond is written *evidence of the*

agreement of the parties; that the feme, IN CONSIDERATION OF MARRIAGE, *agrees the man shall have the land as her portion; and this agreement, being upon a valuable consideration, shall be executed in equity.*"

In *Andrews* v. *Andrews*, 8 *Con.* 79, the contract was in these words: "An agreement between Mr. Daniel Andrews, of Winchester, and Mrs. Jemima Copps, of Colebrook. Mr. Andrews agrees to take and support Mrs. Jemima Copps, during his lifetime, and find her with necessary clothing. At his decease, she is to return to her own house. She is not to take any more property to the said Mr. Andrews' than she pleases; and she is not to bring any of Mr. Andrews' property away, at his decease. Mr. Andrews agrees to let Mrs. Copps make what cloth she pleases. He agrees to do the carding and weaving; and she is to have one-half she makes, to dispose of as she pleases."

Now, here, so far from there being a covenant to marry, or a statement of marriage as a consideration, there is not one word about a marriage in the agreement. But, said the Court: "That the agreement was not founded upon a sufficient consideration, cannot be contended. *Marriage itself is a valuable consideration.* Besides, the husband relinquished all the rights, which, by the marriage, he might have acquired over the estate of the wife. This furnishes a decisive answer to the alleged want of consideration, and would be equally conclusive upon the objection of inadequacy."

So, in *Sellick* v. *Sellick*, 8 Con. 85 note (a), the contract was like the present one, "that should the marriage take effect," &c. The case is thus stated: "James Sellick, at an advanced age, married a second wife. Previous to the marriage, and in contemplation thereof, an agreement, in writing, was entered into between the parties; by which it was stipulated, that should the marriage take effect, and the wife survive her husband, his executors should pay to her, within four weeks after his decease, the sum of 100 dollars, in full of all claims which she might have on his estate, in virtue of the marriage. This sum, the intended wife, on her part, agreed to receive in lieu of dower, and in full satisfaction and discharge of all claims, which she, by virtue of

the marriage, might have upon the estate of her intended husband. The marriage took effect; and in 1808, James Sellick died, leaving his widow surviving. At the time of his death, he owned a real estate of the value of about 6,000 dollars."

Here is no covenant to marry, no express statement of marriage as a consideration, a money consideration shown, and the provision but one-sixtieth of the value of the realty, to say nothing of the personal estate. But the Court barred the widow.

Gelzer v. *Gelzer*, Bailey's Eq. Rep., 388 deserves particular attention. It was argued by very able counsel, first decided by that eminent Chancellor, De Saussure, and his decree unanimously affirmed by the Court of Appeals. The agreement is thus stated in the opinion of the latter court: "The agreement, out of which the question arises, was entered into before, and in contemplation of the marriage between the complainant, then Sarah Lewis, and the intestate, Thomas Gelzer; and it recites, that the said complainant had, 'in her own right, an ample estate entailed and secured to her, of which the said Thomas would not take any benefit after her death;' *in consideration whereof, and of the nominal payment of one dollar*, she covenants and agrees, that, if the said Thomas should die, she surviving, 'she will not have, claim or demand, or pretend to have, claim or demand, any dower, or thirds, or any other right, title, interest, claim, or demand, of, in or to any of the messuages, lands, tenements, and real estate whereof the said Thomas may have been seized during the intermarriage aforesaid.'"

Here is a case in which a consideration for the woman's covenant is expressed, to wit: that she had an estate of her own, in which her intended husband would take no benefit after her death, and the nominal sum of one dollar. Marriage is not stated to be a part of the consideration, nor is there any covenant to marry. But the Court had no difficulty in finding that marriage was a part of the consideration. They said: "The complainant was of full age, and under no legal disability to contract; the subject matter was legitimate; *and the consideration of marriage is sometimes said to be the highest known to the law, and I confess that I have not been able to discover any rule, or principle,*

which discharges her from the obligation which this agreement imposes. She had an ample fortune of her own, so tied up, that she could not confer it upon her husband; and, *in consideration that he would take her in marriage,* she agreed not to claim dower, or any right of inheritance in his estate. It is a contract without fraud, and apparently of perfect equality. Both Atherley and Roper treat this question as one admitting of no doubt."

She agreed, said the Court, "in consideration that he would take her in marriage," although no such consideration was expressed, and there was a consideration stated in which not a word was said about marriage. And the contract, said the Court, was "apparently of perfect equality," although no provision whatever was made for the woman.

But upon this point, I desire no better authority than the Alabama case upon which the learned counsel so much rely. The contract in that case was in these words: "*Articles of marriage contract, entered into this day, between George Hayes and Anne M. Bevil, this 24th day of December,* 1832. Whereas, Anne M. Bevil relinquishes all claim or claims whatever to any of the real or personal estate of the aforesaid George Hayes, so that the said George Hayes, can sell, or otherwise dispose of the same, without any relinquishment of dower by the said Anne M. Bevil; nor can she have any claim or demand whatever to any part of the said Hayes' estate, except what he may hereafter think proper to give her. But in case the said Anne M. Bevil should survive the said George Hayes, then, in that case, she is hereby secured the possession of ten negroes, worth, at this time, three hundred dollars each, and one section of land of medium quality; four hundred dollars worth of stock, to consist of horses, cattle and hogs, at a fair valuation, and corn, and other provisions, sufficient to make a crop with, so as not to exceed three hundred dollars in valuation; and the above property is hereby secured to the said Anne M. Bevil, that it cannot be sold, or otherwise disposed of, by her or any other person or persons whatsoever. Should she have a child or children at her decease, they are to have the entire property, together with its increase, free of any incumbrances. This instrument is to remain good in law and equity. In wit-

ness whereof, we have hereunto set our hands and seals, the day and date above written.

"GEORGE HAYES, [SEAL.]
"ANNE M. BEVIL, [SEAL.]"

Here is no covenant to marry, nor even a recital of an intention to marry; and as to consideration, the only one expressed is strictly pecuniary; yet, as I have shown, had there been a jointure act in Alabama, as there is in Ohio, the court would have specifically enforced the agreement, and barred the widow. They would have followed the decisions to which they have referred and the others that I have cited, and held that however inadequate the pecuniary consideration, the marriage consideration was sufficient to uphold the contract.

Let us now turn to our own reports.

The first case on the subject is *Stilley* v. *Folger*. The agreement in that case recited a contemplated marriage, a desire of the parties respectively to keep their own property, and then followed property covenants by each—all in striking similarity to the present case. But it contained no covenant to marry, nor any express statement that marriage was of the consideration. And yet the court sustained it. But the plaintiff's counsel intimate, if I understand them, that marriage was not a part of the consideration of that agreement. Where they got this idea, I do not know; they certainly did not get it from anything that was said by counsel or court in that case, for by neither was any such thing hinted. The case was argued for the widow with great learning and ability, but it never entered into the head of her counsel, that marriage was not a part of the consideration; nor into the minds of the court either, for they, in general terms, refer to and approve the decisions affirming the validity of ante-nuptial contracts, in which, as we have seen, marriage is uniformly treated as constituting the chief or entire consideration.

The next case is *Scheferling* v. *Huffman*, in which the agreement contained no promise to marry, nor any express statement of marriage as a consideration; and there were property stipulations on both sides. But the court sustained it.

The remaining case is *Hardy* v. *Van Harlingen*, in which no covenant to marry, or express statement of marriage as a consideration, was in the agreement. Yet the court upheld it.

I might easily multiply cases on this point, but I have already unnecessarily extended my remarks upon it. I repeat, that no case can be found in which it is said, or intimated, that it is necessary that the contract should contain a covenant to marry, or should state in express terms that marriage is its consideration. The cases all go upon the ground, that whatever the terms of the instrument, marriage is the chief, and, frequently, the only consideration. As said by Parsons, supra, the consideration is inferred from the "*character*" of the instrument as well as its terms, and as laid down by Lord Hardwicke, in *Cannel* v. *Buckle*, supra, "the inaccurate manner of wording" the contract "is not material," for it is sufficient that the contract itself, however worded, is evidence of an agreement "in consideration of marriage."

Indeed, in the very nature of things, the marriage enters into the consideration, for the contract treats solely of rights whose very existence is dependent upon the marriage, and the marriage itself is the act of the parties. It is not the case of rights created by an act of third persons, or over which the parties have no control; but the agreement to marry, the marriage contract, and the marriage, are the voluntary doings of the same persons, and are inseparable. They are all parts of the same transaction.

I do not understand the plaintiff's counsel as arguing that marriage is no part of the consideration because the engagement to marry preceded the contract. But my associates having anticipated such an objection and answered it, I will add a few words upon it. It is obvious that in most, if not all, cases, the engagement precedes the contract, for it would be an extraordinary proceeding for people to enter into a marriage contract before they agreed to marry, or to make the agreement and execute the contract at the same time. I have never heard of such a case, and nothing of the sort has been produced. Under peculiar circumstances, the engagement to marry and the agreement to execute a marriage contract may take place at the same time, as I think I have

abundantly shown was the case here; but the actual execution of the contract takes place afterwards. Yet we nowhere find it intimated in the books, that marriage does not enter into the consideration of the contract, or that such a consideration would not support it. They are, as before said, all parts of one transaction; but were it otherwise, yet the agreement to marry would enter into the consideration. For valid considerations are either past, executory, concurrent, or continuing, (*Chitty on Contracts*, 61—64) and either is sufficient. There are some past considerations that are merely moral, and from which no legal liability followed, that are not sufficient; but this case is not of that character. But even in that class of cases, if the past consideration is beneficial to the promisor, and he assent to it, it supports his promise.—*Doty* v. *Wilson*, 14 *J. R.* 378. And that marriage is esteemed in law beneficial, will not be controverted. It is unnecessary, however, to argue this question, for it is expressly settled by authority, that marriage is a *continuing* consideration.

Thus, in *Sidenham* v. *Worlington*, 2 Leon. 224, the court said: "Marriage is always a *present* consideration."

So, in *Baber* v. *Halifax*, Cro. Eliz. 471, the court say: "An assumpsit in consideration that you had married my daughter, to give you £40, is good, for the affection and *consideration always continue*."

And in *Townsend* v. *Hunt*, Cro. Car. 408: "If it had been a consideration *continuing*, as in consideration of marrying his daughter or cousin, which is a gift in frankmarriage, it had been good."

And see *Marsh* v. *Rainsford*, 2 Leon. 111; Bacon's Abr. Assumpsit D., and Chitty on Contracts, 5th Am. Ed. 64, where, treating of what are continuing considerations, he says: "So, marriage is a *continuing* consideration."

In speaking of marriage contracts, of which they admit marriage to be the consideration, the plaintiff's counsel say: "But these contracts are family settlements; they are entered into on consultation with friends, and with aid and advice of counsel." Do my learned friends mean to assert by this that a settlement

by a father, mother, brother, sister or other relative, is necessary to constitute a contract of which marriage is the consideration? If so, I have only to refer your Honor to the numerous cases I have cited, in which there was no such settlement, and yet marriage was held to be the consideration. But I can hardly suppose that so unheard of a proposition was seriously advanced. Indeed, if they mean that any *settlement* is necessary to constitute a marriage contract, they are mistaken, as some of the cases already cited, and many others, abundantly show. A settlement proper upon a woman is where property, *not her own*, is limited to her or for her use; in the language of the court, in *Hardy* v. *Van Harlingen*, 7 O. S. R. 212, it is the instrument "by which the wife *originally acquired* the estate." But if the contract merely secure to her her own estate, it is not, strictly speaking, a settlement; but it is, nevertheless, a valid marriage contract, and marriage is the consideration. That was precisely the case of *Hardy* v. *Van Harlingen*, and marriage was the sole consideration. It is the same if the parties be reversed, and it is the husband's property that is secured to him. Such were the cases of *Andrews* v. *Andrews*, and *Gelzer* v. *Gelzer*, *supra*.

The contract under consideration has both features. It secured to the wife her own property, and made a settlement upon her out of the estate of the husband. So, even upon the theory of the learned counsel, marriage might be its consideration.

Nor could counsel have seriously meant to say that it is essential to the validity of a marriage contract, that it be "entered into on consultation with friends, and with aid and advice of counsel," for such a doctrine would have overturned a large majority of the contracts that have been upheld by the courts. The absence of such consultation, aid and advice, has sometimes been referred to, where the contract was assailed on the ground of fraud or improvidence, but never as constituting, *per se*, a fatal objection to it, or to show that marriage was not the consideration. This is strongly illustrated by the case of *Stilley* v. *Folger*, in which it was urged by the plaintiff's counsel, that "the woman with whom the contract was made can neither read nor write. There is no evidence that it was explained to her; and, instead of being surrounded by her own friends, or by the

officers of the law, she executes it under the eyes of a son and sister of her future husband, and in his house. What an opportunity for fraud!" This statement of the case was not denied by the adversary counsel or the court; indeed the court added to it the fact that Obed Folger, a son of the intended husband, and who was interested in keeping unincumbered the property that he would probably inherit, "guided the hand of Mrs. Stilley, when she signed" the contract. Nevertheless, the court enforced it.

I have thus demonstrated, I humbly submit, that marriage does enter into the consideration of this contract, that it does not stand upon a pecuniary consideration alone, and that no authority has been, and, I venture to say, none can be, produced that declares such a contract to be unreasonable. And, having done so, I might well enough cease to consider this point; but as the character of Mr. Ross has been vehemently attacked; as he is held up to your Honor as a man who "had not a just moral appreciation of what was due from him" to the woman he was about to marry; as we are told that he improperly obtained from her a contract that "was grossly unequal;" and that he was "exactly the man who could perceive no moral wrong in obtaining over her the advantage which he did obtain, in the manner in which he obtained it;" and as these charges are made on behalf of one who, it might not unreasonably be supposed, should be the first to defend his memory, I trust that I will be pardoned if I dwell a little longer upon the subject.

Now, may it please your Honor, Mr. Ross was no such man as he is here represented. He was, I admit, what it would be well for more of us to be, a man who, in a preëminent degree, consulted the dictates of his judgment, and was not to be deterred from doing what was right by a fear of being considered illiberal. He was a man who would have given pounds to a charity that his reason approved, if satisfied that his bounty would be properly applied; but not a shilling for an object that his judgment condemned, though all the world had been ready to cry out shame. But he was, in the highest sense of the term, a man of integrity,

and his friends might safely challenge all who knew him to point out a single individual that he ever wronged out of a cent. In the extremity of their necessities, the plaintiff's counsel have alluded to his tax lists, as if they had been made out by him; as if they were not, as we all know, the sole work of the assessors; as if it were not notorious, that ninety-nine out of a hundred of the lists of moneyed men throughout the State were and are made out in the same way; and as if the just amount of taxes paid by an individual depends upon the absolute, instead of the relative, correctness of his list. Let the learned counsel show that the capital on which Mr. Ross was taxed, was not the just proportion of the duplicate which his wealth bore to the wealth of the State; that lands and town lots were not appraised at less than their value; that all chattel property was correctly appraised; and that every individual but himself gave in a full list of his moneys and credits — let them do this, and they may reproach him at will with not discharging the duty of a citizen. But until they do this — until they show that it is dishonest to do that which the law expressly permits — namely, suffer the assessor to make out your list — until they are ready to denounce as wanting in a sense of moral obligation, the thousands and tens of thousands of citizens who annually thus suffer the law to take its course — it will not do for them to assert that Mr. Ross was not "a strictly scrupulous man," and that he defrauded the State. If the truth could be ascertained, I have no doubt it would be found that he paid his full and just proportion of taxes; but, be this as it may, there is not a tittle of proof to justify a charge that he willfully evaded doing so.

With the character of Mr. Ross, the plaintiff was thoroughly acquainted — no one more so; and with him, she — a sagacious, practical-minded, business woman, of more than ordinary intellect and experience — made the contract in question. What may we reasonably suppose were the thoughts, if not the language, of the parties on that occasion? Doubtless something like this: "We are both far advanced in life. Jane's health is infirm, and her chance of survivorship is scarcely, if at all, better than William's.

The probability of a long survivorship is extremely remote. We have been economical all our lives, until economy has become a habit; and it would not contribute to our happiness to be otherwise. Neither of us has been accustomed to live fashionably or expensively, nor do we desire to do so. Jane has an estate of her own that has been amply sufficient for her comfortable and decent support, and no change of social position, requiring an increased expenditure, is contemplated by either of us. But William is able, and ought to make such provision that her support, if she survive him, shall not be precarious. It ought to be amply sufficient to supply all her necessities and comforts; and for this purpose he should let her retain her own means and add something from his. But he is not bound, after making this provision, to divert his property from his own kindred to give it to hers."

Such, I feel warranted in inferring, were the thoughts of the parties; and to these we are to add the further considerations, that the most of his property was personalty, to which marriage would give her no right, over which his power of disposition during life would remain absolute, and that of his real estate he gave her, not the use of a third which would be her dower right, but the use of nearly all.

And now, may it please your Honor, has she this ample support? That she has, it is only necessary to glance at the following tables, in which, I may remark, that the extent and value of her own estate, and the rents of her realty, are set down from her brother's testimony:

TABLE I.

THE PECUNIARY ADVANTAGES TO HER OF THE MARRIAGE.

At marriage, Mrs. Ross owned—

Personalty—exclusive of house-hold furniture, &c.		$4,250 00
Realty—Her dwelling and lot	$4,000 00	
One-half Paint Street Store	2,000 00	
One-half Foundry	1,500 00	
		7,500 00
		$11,750 00

The income of which, excluding her dwelling, may be estimated as follows :

$4,250 personalty at 6 per cent	$255 00
Her one-half of the rent of the Paint Street Store	200 00
" " " " " " Foundry	90 00
	$545 00

All this was allowed to accumulate for her benefit. Therefore, calculate,

Personalty as above	$4,250 00	
	255 00	int.
1st year	4,505 00	
	270 30	int.
2d year	4,775 30	
	286 52	int.
3d year	5,061 82	
	303 71	int.
4th year	5,365 53	
	321 93	int.
5th year	5,687 46	
	341 25	int.
6th year	6,028 71	
	361 72	int.
7th year	6,390 43	
	383 42	int.
8th year	6,773 85	
	406 43	int.
9th year	7,180 28	
	430 82	int.
10th year	7,611 10	
Deduct the capital	4,250 00	
Profit	$3,361 10	

RENTS.

1st year's rent	290 00		
	17 40	int.	
2d year's rent	290 00		
	597 40		
	35 84	int.	
3d year's rent	290 00		
	923 24		
	55 39	int.	
4th year's rent	290 00		
	1,268 63		
	76 12	int.	
5th year's rent	290 00		
	1,634 75		
	98 08	int.	
6th year's rent	290 00		
	2,022 83		
	121 36	int.	
7th year's rent	290 00		
	2,434 19		
	146 05	int.	
8th year's rent	290 00		
	2,870 24		
	172 21	int.	
9th year's rent	290 00		
	3,332 45		
	199 95	int.	
10th year's rent	290 00		
Profits of her real estate allowed her	$3,822 40		

Her dwelling that was burned was worth not over		$2,500
Mr. Ross built the new house at a cost of over		8,000
The increased value, then, put upon her property was about		6,000
Year's support allowed by appraisers, cash	$1,000	
And chattels not less than	500	
		1,500
Articles not deemed assets and set off to her not appraised, but estimated at not less than		$350 00
Devise to her of		10,000 00
" " " of Personalty absolutely		400 00
		$10,750 00

Devise of life estate in about $1,000 of personalty. See inventory.

So the pecuniary profits of the marriage to her were:

The interest aforesaid on the $4,250	3,361 10
Profits aforesaid of her real estate	3,822 40
Increase in value of dwelling	6,000 00
Year's support	1,500 00
Articles not assets	350 00
Devise of cash	10,000 00
" of personalty absolutely	400 00
	$25,433 50

And her life estate in $1,000 of personalty.

TABLE II.

HER PRESENT ESTATE.

Her property at the time of his death, supposing her to take according to the contracts and will—

Realty—Dwelling house property	$10,000	
One-half Paint Street property	2,000	
One-half Foundry property	1,500	
		$13,500 00
Personalty—Her $4,250, with the accumulated interest	$7,611 10	
Accumulated profits of her real estate, (dwelling excluded), during coverture	3,822 40	
Year's support allowed by appraisers	1,500 00	
Articles not deemed assets set off to her	350 00	
Devise of cash	10,000 00	
" of personalty absolutely	400 00	
		$23,683 50
Total of real and personal estate		$37,183 50

To which is to be added her life estate in personalty, appraised at about $1,000.

TABLE III.

HER INCOME.

Realty, excluding dwelling house—		
Rent of one-half Paint Street property		$200 00
Rent of one-half of Foundry		90 00
		$290 00
Personalty—Her $4,250 and accumulated interest	$7,611 10	
The accumulated rents of her realty during coverture	3,822 40	
Devise in cash	10,000 00	
		$21,433 50

She has thus a capital of $21,433 50 (exclusive of the other provisions aforesaid for her) of personalty to invest for income, which, at 6 per cent. per annum, produces	$1,286 00
Add rents of real property as above	290 00
Annual income	$1,576 00

Besides which, she has a dwelling house, fully furnished, and other provisions as aforesaid, amounting to about $2,200.

Including the value of the use of her dwelling, as should be done in estimating her means of support, and these means are annually at least $1,800.

If her capital above mentioned ($21,433 50) is invested at 10 per cent., instead of 6, which is probably nearer the mark, her income, exclusive of the use of her dwelling, is $2,333 35, and including that use not less than $2,550 per annum.

Now in view of the facts presented by these tables, with what justice, I ask, is Mr. Ross denounced as he is? Is it true, that after adding over $25,000 to her estate, and securing to her an income greater than the salary paid to any officer in Ohio save one, an income greater than that upon which nine-tenths of the fathers in Ohio support their families, an income twice as large as is necessary to provide for all her wants and all her comforts, he yet deserves the stigma of being insensible to moral duty and capable of defrauding the very wife of his bosom? And are $37,000 so small an estate, and from $1,800 to $2,500 per annum so insignificant an income, for a single woman of plain habits and in the decline of life, that it is necessary to overturn the solemn contract of the parties, and add a quarter of a million to her means, in order to make her "a reasonable provision?"

Counsel refer to the testimony of Mrs. McLandburgh on this subject, and I sincerely thank them for doing so; for what was the opinion of that very sensible woman, the friend of both parties and the aunt of the plaintiff? Did she think the agreement grossly unjust, and indicative of a heart insensible to moral obligation? That she did not, is apparent from the facts that she never warned her neice against it, that she never intimated that the provision was not adequate, and that her sole objection was limited to a suggestion to Mr. Ross, that, inasmuch as the

plaintiff would not have the corner property until after his death, he ought to pay rent for her realty, if he used or occupied it; an idea that was not acceptable to him, as he thought a man ought not to be the tenant of his wife—meaning, no doubt, that it was not advisable that they should have accounts to keep with each other. In this he was right, and what he said indicated no disposition to be unjust towards the plaintiff; on the contrary, there is no reason to believe that he would not have respectfully listened to a suggestion of inadequacy, and, if convinced that the provision for the plaintiff was not adequate, would have made it adequate. But no such suggestion was made, for there was no room to make it; and so, without objection by the plaintiff or her friends, the contract was executed. Now, a contract in which the affection of a relative could discover no greater defect than that suggested by Mrs. McLandburgh, may safely be assumed to be fair and reasonable; and that Mr. Ross' reasons for not acquiescing in the suggestion were those above mentioned, may be inferred from the fact that he never touched a dollar of her rents, but allowed her to receive them all; and as to her dwelling house, he gave more than four-fold what would have been a fair rent, by erecting the new dwelling.

The plaintiff's counsel say: "By the answer and by the evidence, it sufficiently appears that the parties had been for many years so far contracted in marriage that the petitioner, at any time, might have recovered damages at law for a failure to execute it. She was entitled to the marriage, and the public at large had long been apprized of the relations of the parties. Under this settled subsisting engagement, the future husband had, in the ordinary course of things, for this long period of time, the same influence over the mind and the acts of the wife which grows up in the actual marriage connection. And before the ante-nuptial contract was proposed, the actual verbal agreement to marry had been made between the parties, and her friends were advised of the fact."

It would be difficult to find in print, in the same number of lines, as many errors as are contained in this extract—every sentence of which is erroneous.

1. The breach of promise case is a sheer assumption. The plaintiff herself don't pretend that there were more than two engagements. (See her petition.) The first of these was mutually dissolved, so that gave no cause of action; and the other was executed.

2. She was entitled to the marriage, just as every woman who becomes engaged is entitled to it; and as to the knowledge of the public, why her own aunt did not suspect there would be a marriage until Mr. Ross told her of the engagement.

3. There is no proof that he had any more influence over her than she had over him, or that either had more influence over the other than usually exists where parties are engaged.

4. The engagement was not known before the contract was *proposed.*

The counsel next assume, without proof, that the contract was dictated by Mr. Ross—that it was not an agreement of parties, but a mere expression of his will; and, to support this theory, they state, that Mrs. McLandburgh said to Mr. Ross, "'It is all your own work, William Ross; Jane had nothing to do with it,' which he admitted to be so."

Here are more mistakes. Mrs. McLandburgh did testify that she said to Ross, "This is your work," but she did not, unless both our memories and our notes are faulty, add the expression, "Jane had nothing to do with it;" and she certainly did not testify that Ross admitted any such thing. On the contrary, she testified expressly, that Ross said that he and Jane had *agreed* about the property, and not one word did she utter that indicated that the terms were not settled by *agreement.* The whole scope of her remark, "this is your work," fairly understood, is, that the proposition for a contract came from Ross, not that he dictated its terms. This is probable enough, though the testimony of the witness is proof of nothing but her own surmise. Indeed, the counsel themselves, at the bottom of the same page of their argument, say, "that the terms of the contract were fixed between him and his intended wife."

Unless I am greatly mistaken, counsel fall into another error about Mrs. McLandburgh's testimony. They say that "she said to

Ross that the contract was hard and unequal." She certainly did point out what she supposed to be an inequality, but I have no recollection that she used the word "hard," nor do I find it in our notes. I feel very confident that she did not use it.

Counsel argue, "That she had no means of knowing, and did not know, the value of his estate, and the reasonableness of the provision, is proved by evidence of the extreme closeness with which he kept his affairs," and by the errors of the assessors.

Reply. It cannot be assumed that she was ignorant of his *realty*, for he settled nearly all of it upon her. And as to his personalty, it matters not how much he had, because, for reasons before stated, that affords no test of the reasonableness of the contract. But what are the facts? It was proved by the testimony of numerous witnesses, and disproved by none, that he was universally reputed to be the wealthiest man in Ross county save one; and as he had, comparatively speaking, but little real estate, it was of course understood that the bulk of his wealth was personalty. Now, it cannot be presumed, that this reputation, thus known to every body, was unknown to the plaintiff, or that there was any reason why she should deem it to be false. On the contrary, the long intimacy of herself and relatives, male and female, with Mr. Ross, gave her better opportunities to know the extent of his fortune than were enjoyed by the public. It is said that he was secretive concerning his wealth, but the testimony does not bear out the assertion; for it is clearly proved by his clerks, that his books, showing what he was worth, lay upon the desks of his store, open to their examination, and it nowhere appears that he ever laid an injunction of secresy upon any of them. Nay, more: after he ceased merchandizing, and was succeeded by the firm of Wilson, Miller & Woodrow, the books remained with them, accessible not only to them, but also to their clerks, if they had any. (See the depositions, and especially Mr. Woodrow's.) Here is no evidence of secretiveness, but just the reverse; and in view of this testimony, whose tendency is not in any way rebutted, I feel warranted in saying, that while Mr. Ross was too sensible a man to boast of his wealth, on the other hand, he made no effort to conceal it. At all events, he did not conceal it from his

clerks, or tell them to conceal it; and for many years these clerks boarded with the plaintiff, and one of them was her own brother. Under these circumstances, to suppose that she was under any delusion as to his fortune, is, without disrespect be it spoken, simply absurd.

As to the blunders of the assessors, it is not pretended that she knew what was in the tax lists; and had she known, there is no reason to suppose that she would have been deceived by them. Will any one pretend that she thought Mr. Ross had but $36,000 of personalty at the time of the marriage? I am sure that she will not pretend so; for had that been her belief, she would have so stated in her Reply; and besides, she was by far too sensible a woman to think that a man of no more means than that could enjoy the reputation of being the wealthiest man, save one, in the county. The truth is, these tax lists are of no value whatever as testimony, even were they admissible, which they are not; and it will be remembered that they were read subject to exception. By such testimony, if the effect contended for were given to it, it would be easy to prove that every man, who does not give in a sworn list, is of the secretive character attributed to Mr. Ross; for the under estimates of assessors are not the exception, but the general rule.

Ex parte Marsh, 1 Atk. 158, was a case in which the specific execution of a marriage contract was resisted on the ground that the man had been deceived in respect to the extent of the woman's fortune. It was the same in principle as this case; the parties being reversed obviously making no difference. But Lord Hardwicke decreed a specific execution. He said: "This (the contract) is in consideration of the marriage, and of the fortune she brought; and, unless some *fraud* appears, it must have its effect." And, again: "A man thinks fit to marry a single woman or a widow, and imagines she has such a fortune, and perhaps on a strict account, or by some defective debts, it should fall short, it would be very mischievous to set aside marriage agreements for this reason." That is, his Lordship repelled the idea of invalidating such contracts by showing a wrong estimate of a party's property, unless there was *fraud*.

Finally, on this branch of the case, it is said: "Besides, it was a most unpropitious circumstance, that the terms of the contract were fixed between him and his intended wife, after he had secretly consulted counsel on his part, without friend, or counsel, or adviser, as he well knew, on hers. The books condemn a transaction so entered into on the face of it, unless the contract be such that prudent counsel would have advised her to enter into it."

I might content myself with saying that this case comes within the very exception above stated; for the contract is one that prudent counsel, if he had thought it proper to advise her what to do, would have told her to enter into. I don't suppose that professional prudence would exact of counsel, on such an occasion, to advise his client to chaffer for a bargain, or to treat the transaction as a property trade about a horse. It may do now for the learned counsel to say, that "it is a pure money or property contract;" but, with all proper deference, I cannot avoid a doubt whether that would have been their opinion had they been called in to advise when the contract was made. Had Mr. Thurman been called in, as counsel are pleased to imagine, I will not undertake to affirm what he would have said. It is very probable that he would have reasoned something after this wise: "With the *terms* of this contract, except to see that they are legal, I have nothing to do. The parties know their own business better than I can know it; and they have the legal and actual capacity to make their own bargains. It is not the province of counsel or courts to *make* contracts for people, and marriage contracts are not exceptions to this rule. I see here no attempt at imposition, and the agreement is not unreasonable, either in fact or according to authority. There is nothing, therefore, for me to say to the parties, nothing that in the character of a lawyer it would be proper for me to say, except that I consider this a valid and effectual instrument."

But had Mr. Thurman felt authorized, as a friend, to go beyond the sphere of his professional duties, it is not very probable that a marriage to a highly respected, intelligent, educated and amiable man; an exemption from all expense while the coverture should last; the absolute ownership of her own estate, and a cer-

tain and ample support for life out of his estate when he should be no more, would have seemed so very bad a bargain for a lady of forty-nine, as to warrant him in counseling her to insist upon more.

I think your Honor will have no difficulty in arriving at the same conclusion, especially when aided by the results of the marriage, as shown by the preceding tables. If so, there is an end of the objection; for, as counsel correctly admit, it is only when courts are called upon to execute *unreasonable* contracts, that they inquire whether they were providently or improvidently made.

The law is thus stated in the American note to *Huguenin* v. *Baseley*, 2 Leading Cases in Equity, Pt. 2. 65:

"Fraud and mistake vitiate and avoid a conveyance, without regard to the source whence they originate, or the effect which they produce. But in order to avoid a grant on the ground of undue influence, it must be shown that the influence *existed*, and was *exercised* for an *undue* and *disadvantageous* purpose. The former point may be inferred from the relative or actual position of the parties; but the latter must be determined by an examination into the *nature* and *results* of the transaction which is called in question. *Both these points must concur to produce the effect of avoidance.* The disadvantageous or improvident nature of a grant will not entitle the grantor to set it aside, when it is the result of his own folly or indiscretion, and not of external or improper influence. *Hadley* v. *Lapmer*, 3 Yerger, 537. *Nor can he avoid it as having been procured by influence, when it is just in itself, and in its consequences. McDonald* v. *Neilson*, 2 Cowen, 139."

So, in the English note to the same case (page 57): "But if the transaction is reasonable, and entered into with good faith, equity will not interfere"—citing authorities.

And by Lord Hardwicke, in *Stapilton* v. *Stapilton* (same vol. 253): "Another objection has been taken, that the father made use of his coercive power over Philip, to force him into this agreement; and, it is said, equity does not favor agreements made by compulsion. *But this Court always considers the reasonableness of the agreement.*"

Before proceeding to notice the authorities cited by counsel on this head, I must call attention to some further errors of fact into which they have fallen.

They assert that the terms of the contract were fixed after Mr. Thurman was consulted. I have shown, I think, that they were fixed at the time of the engagement; but whether that is so or not, it is positively certain that they were agreed on before Mr. Ross had heard a word from Mr. Thurman, and that the legal advice sought, was merely whether such a contract was permitted in Ohio. Mr. Thurman's opinion was not delivered until July 15th; but before this, Mr. Ross had told Mr. Dun what property the plaintiff was to have; and as early as the 12th or 13th, had stated the terms of the agreement in detail to Mrs. McLandburgh.

Again: It is assumed that Mr. Ross "secretly consulted counsel on his part." Suppose this were so: of what significance is it, when the inquiry was merely whether the laws of Ohio allowed the contract; when the correctness of the advice given is not, in any degree, impeached; when it did not, and could not, have misled the plaintiff; and when the knowledge it imparted did not, and could not, give Mr. Ross any advantage over her? But there is no proof of the alleged secrecy of consultation. An A. and B. case, it is true, was put to Mr. Thurman, (pretty strong proof, I repeat, that the engagement of the parties had not become public, as is pretended;) but there is nothing to show that this was done by Mr. Ross without the knowledge of the plaintiff, or that the advice was sought on his part more than on hers.

Yet, again: It is said that she was "without friend, or counsel, or adviser, as he well knew."

Now, he knew no such thing; for such was not the fact. She had plenty of relatives and friends, if she chose to consult them; and there were plenty of counsel in Chillicothe, if she wanted their advice. How many persons she consulted before the contract was executed, your Honor don't know. It may be, that satisfied with its provisions, as well she might be, and having a just confidence in her own judgment, she consulted no one; but if that be so, it was her own choice thus to act. There is no

pretense that Mr. Ross enjoined silence upon her; for the very first thing he did himself, was to communicate the agreement to her aunt.

Counsel say:

"Lord C. J. Wilmot says, that the attorney who makes the papers, should go and talk with the grantor and grantee about it. That is, that both should have the benefit of legal counsel. 1 Wilm. 69; 14 Ves 297."

I am sure that my learned friends did not look at the case (*Bridgeman* v. *Green*) decided by Wilmot and his associates; for if they had, they would not have referred for his remark to 14 Ves. 297, (*Huguenin* v. *Baseley*,) nor made a statement which seems to imply that he was laying down a general rule, or one that is applicable to a case like the present. Bridgeman v. Green, was first decided by Lord Hardwicke, 2 Ves., Sen., 626, and his decree affirmed on a rehearing by the Lords Commissioners. (Wilmot 58, et seq.) It was not a case of marriage contract, or of an instrument supported by a consideration; but of a grant obtained by fraud and without consideration. Green was the servant and Lock the lawyer of Bridgeman, who was a weak man, (in the language of Lord Hardwicke, "a very imprudent man, but not so weak as to be called a fool,") and over whom Green "had got great influence." To defraud this improvident man, Green and Lock formed a combination, the first step in which was to create "dissension between him and his wife," and get him to live separate from her, and thus deprive him of her watchfulness. This, Green's influence was sufficient to accomplish; and having accomplished it, the plaintiff was induced to convey an estate to Green, without consideration, on pretense of qualifying him to kill game. This was the second step. The third was for Green to deliver up that estate, and in consideration thereof, to get from the plaintiff a conveyance of another estate; which was done. Finally, he was made to mortgage his whole estate to raise £5,000—3,000 thereof to be paid to Green and his (Green's) wife, 1,000 to Green's brother, and the remaining 1,000 to Lock in trust for his (Lock's) son—all without any consideration whatever;

in addition to which, Lock got from him two promissory notes, for £105 and £123—the one for procuring the money, the other for his bill of costs.

The bill was filed against Green, Lock, et al., to compel them to account for the £5,000. Their defense was, that the plaintiff gave them the money. But the case was so outrageous, (a combination by a man's own lawyer and his confidential servant, to take advantage of his weakness and defraud him out of his estate, and by such diabolical means, among others, as that of setting him at variance with his wife, and separating him from her,) that the very first sentence uttered by Lord Hardwicke was as follows: "Next to the surprise and concern one has to see persons enter into such a combination as this, is the surprise to see it contended in a court of justice." And, in view of the evidence, he said that it was "the plainest case of imposition," and that "he never saw a more barefaced and shameful transaction." As to Lock, the attorney, he expressly found him to be *particeps fraudis;* and that the £1,000 pretended to be for his son, were in fact for himself; and he decreed *in solido* against all the defendants, saying: I "must charge them all with the whole, all being combined together."

Now, it was in reference to this man—engaged in a conspiracy against his client, and plundering him by means of a mortgage that he did not understand—a defendant in the suit, and against whom a decree had been rendered, that C. J. Wilmot said that he ought to have talked to the grantor. Certainly he ought; and more, too. He ought to have refrained himself from an attempt to cheat his client, and not to have knowingly suffered another to cheat him. This is all that can be drawn from the remark of the Chief Justice, and it in no manner supports the inference which the plaintiff's counsel seek to draw from it. Lord Hardwicke made no such remark, for the fraud was plain enough without dwelling on that circumstance.

On the trial of Judge Peck, (page 299,) Judge Spencer, in speaking of a case decided by Wilmot, rather contemptuously remarked: "If I mistake not, this is the same Judge Wilmot who maintained that the consideration of a promissory note, between the original parties, was not inquirable into; and he pro-

bably led Blackstone into one of the greatest errors, in maintaining that assertion, in his whole commentaries." I am under no necessity, and have no desire to utter a like sarcasm; but I should think it well deserved, had the Chief Justice gone so wild as to hold that a marriage contract is impaired by the absence of legal advice. For the books are full of cases sustaining such contracts, where there was no such advice; and not a case can be found that makes it essential to their validity. But I need go no farther than the case of *Stilley* v. *Folger*, the circumstances of which, in this particular, I have hereinbefore shown.

I may remark, in passing, that the book from which Wilmot's remark is cited—"Notes of Opinions and Judgments Delivered in Different Courts, by Sir John Eardley Wilmot"—was published in 1802, many years after his death, and has never, I believe, reached a second edition; the reason of which may be found in the following remarks respecting it, in Marvin's Legal Bibliography: "These were certainly not intended by the learned Judge for publication, and some of them are not perfect. There is no doubt but they would have been all equally valuable, if they had all received his last correction; and still more, if his modesty had permitted him to revise them with a view to publication."

Wilmot's remark is referred to by Lord Eldon, in *Huguenin* v. *Baseley*, not as a fatal objection *per se* — for no case intimates that idea — but as a circumstance which, with the other special circumstances, tended to prove that the grantor, Mrs. Hill, afterwards Huguenin, did not understand the instruments. It is true, that the conduct of the solicitor in that case is censured, and very justly; for he was the solicitor of the grantor, and, therefore, bound to take care of her interests, especially as she was a weak minded and superstitious woman, and the instruments were very complex, and such as few persons, not lawyers, would comprehend without explanation. Instead, however, of protecting her, he not only permited her to *give* away her estate to Baseley, her spiritual adviser and also her agent, but he also took "to himself an advantage with respect to the property." By the arts of Baseley, whom she regarded as a friend provided for her by a special interposition of Providence, she was induced to withdraw her bus-

iness from the solicitors who had it in charge, and confide it wholly to him; and he accordingly took charge of it, and placed it to a certain extent in the hands of his own solicitor, who thereby became hers also. Having thus *assumed the management of her affairs as her agents*, the law of course imposed upon them the duty of protecting her interests; and having failed to do so—nay, worse, having defrauded her themselves — they were most righteously condemned by the Chancellor. She had advice, but it was fraudulent advice. Baseley, the parson and agent, advised her, but for his own benefit; the solicitor advised her, but so as not to interfere with Baseley's purpose; and her only relatives, who could have protected her, were *silenced* by a suggestion, "that ample provision was to be made for their children." And so the poor woman, surrounded on all sides by deception, dominated by her priest, betrayed by her agents, and wilfully unprotected by her relatives, gave away her property by instruments which the Court expressly finds she did not understand — gave it away when she had mother and brother, and nephews and nieces — nay, more, was on the eve of a marriage that might give children to herself.

Well might the Chancellor say, that her agents had not placed around her that "care and providence" "which, from their situation in relation to her, they were bound to exert on her behalf;" and well might he exclaim, in view of her weakness and the means by which she was influenced, that the question was, "not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced;" but that my learned friends should apply these remarks — special to a case of the grossest fraud — to a case like the present, is just ground for astonishment. Let them show that Jane Welsh was a superstitious and weak minded woman; that William Ross exerted over her an influence akin to spiritual domination; that she had surrendered to him the whole management of her affairs; that he selected her lawyer to betray her, and that she was so betrayed; that her relatives were silent because they thought it their interest to be so; that the instrument she executed she did not understand; that she *gave* away her *own* property to her fraudulent

agent; that she cut off from her bounty the very mother that bore her, and her own possible offspring — let them do this, and they may cite *Huguenin* v. *Basely* as authority, and apply the language of Lord Eldon in all its force. But to do so, in a case where there is no undue influence, no misrepresentation, no corrupt silence, no scheming arts, no agency, no gift of property, no ignorance of the terms or effect of instruments — a case of contract, contract between persons fully capable, contract upon ample consideration, contract that has given a fortune to the woman, contract so plain that a child might understand it — to do so in such a case, is to pervert, instead of applying, authority.

Counsel refer to the argument of Sir Samuel Romilly, and quote his saying, that "relief stands upon general principles, applying to all the variety of relations in which dominion may be exercised by one person over another;" but by looking at the context, your Honor will observe that the remark relates to *gifts*, and not to contracts upon sufficient consideration. It had been argued for Baseley, that, if the relation of principal and agent disqualifies the latter to accept a bounty from the former, the rule applies only where the agency is for reward. Sir Samuel denied this limitation, and asserted the general principle above quoted — a principle that has been approved thus far, that if undue influence be proved, and it be shown that it was exercised to procure the gift or grant, it matters not by whom it was possessed and exercised. But, except in the cases of attorney, guardian, or trustee, such influence is not presumed from the mere relation of the parties: it must be proved. (*Hunter* v. *Atkins*, 3 *My. & K.* 135.) Hence, in *Huguenin* v. *Baseley*, Lord Eldon would not set aside the gift on the mere ground that the donee was the spiritual adviser of the donor. After stating that relationship, and also his agency for her, and the character of the instruments, he says: "To the question, whether, these instruments being such as I have represented them, the consequence is, that this Court shall undo them, I answer, No: if they are the pure, voluntary, well-understood acts of her mind."

But it is unnecessary to go beyond our own reports There is

certainly no relation that creates a stronger influence than that of husband and wife; and, indeed, the plaintiff's counsel liken this case to that, and build their arguments upon the assumption. But in *Lewis* v. *Baldwin*, 11 O. R. 352, and in *Hardy* v. *Van Harlingen*, 7 O. S. R. 208, gifts of almost their whole estates, by wives to their husbands, were sustained; and in the former case impliedly, and in the latter expressly, the court held, that "undue influence will not be presumed from the mere relation of the parties; it must be shown, either by direct proof, or by circumstances from which it may be fairly inferred." And that circumstances infinitely stronger than those under consideration, will not justify such an inference, is very plainly shown by each of these cases. In the first case, the wife was young, sick, shortly to die, and, as the bill charged, of debilitated mind; a charge that was probably true, for the court did not negative it, but merely found that "she was of *sufficient* mental capacity to make a contract." The donee was not merely her husband, but also her pastor; and "she reposed (said the court) entire confidence in him as her husband, friend and spiritual guide. She had brothers and sisters, and the estate came to her, I presume, from a common ancestor. Her husband could have no claim upon it after her death, for there was no issue of the marriage, and so the transaction was an unqualified gift. Yet the court saw no undue influence in these circumstances, and sustained the deed.

Hardy v. *Van Harlingen*, is, in some respects, a similar, and, in others, a still stronger case for us. There, the transaction was a gift, the donor a wife, the donee her husband, her age less than nineteen years, her health irrecoverably bad, her end approaching, her residence among strangers, the property derived from the common ancestor of her and her brothers and sisters, the brothers and sisters living, and some direct proof, not very credible it is true, of importunity by the husband; and yet the court found no undue influence.

And in neither of these cases had the husband made any provision for the wife.

Now, if under such circumstances, a *gift* of her whole estate, by a young and feeble and dying *wife*, to her *husband*, from

whom she had never received or been promised anything pecuniary, is sustainable, and undue influence will not be presumed, with what face, I ask, is it to be presumed when there was no existing marriage, but only an engagement; no gift, but on the contrary, a large pecuniary consideration in addition to that of marriage; no youth, but far advanced age; no mortal sickness, but health sufficient to justify marriage; no feebleness of mind, but strong and vigorous intellect; no domicil among strangers, but relatives and friends all around to consult? The learned counsel exclaim, "What *care and providence* ought to have been placed round Jane Welsh by her intended husband, her sole adviser, if not dictator! Surely he should have seen that she had the benefit of counsel learned in the law, as well as himself." In reply, I ask, what care and providence were placed around Mrs. Baldwin and Mrs. Van Harlingen by their *actual* husbands? What counsel learned in the law did they call in, when about to receive from their wives *donations of their whole estates?* What relatives even were consulted, or in reach of consultation?

Whelan v. *Whelan*, 3 Cow. 537, cited by counsel, was a case of conveyances of all his estate, for a trifling consideration, made by a weak and credulous father of 74 years, to two of his sons, who were the managers of his business, to the disinherison of his five other children. There was direct proof of fraud, imposition and undue influence; and so the conveyances were set aside by a majority of the Court of Errors. The decision may have been correct, though its force is somewhat lessened by the fact that Chancellor Kent dismissed the bill; and seven of the Senators, among whom were Bronson and Wright, were for affirming his decree. However, the case has no analogy to the present case.

Counsel say: "The case of *Campbell* v. *Spencer*, 2 Binney, 133, marks the distinction which courts of equity take in setting up and setting aside a contract."

"C. J. Tilghman says: 'Though there is no express evidence of unfair advantage, or that the price was very inadequate, *yet there are circumstances in the transaction which I do not like.*' And he therefore refuses to grant a new trial, which was equivalent to

refusing a decree for specific performance, had he been Chancellor."

This inference is an error, as is shown by both the case and the express language of the Chief Justice. A new trial had been granted by Judge Yeates, for which he was reversed by his brethren, Tilghman and Brackenridge. After saying, that, had the case been brought before him, as a chancellor, for specific performance, he should "have felt considerable difficulty in forming a decision," and that there were circumstances in the transaction which he did not like, referring to them, he adds: "*I will not say, nor have I made up my mind, how a chancellor ought to decree, under all these circumstances. But that is not precisely the point before us. The jury found for the defendant, which strengthens his case very much.* I am now to consider whether that verdict is so *clearly* wrong, that a new trial should be granted." And, afterwards, in conclusion: "The result of my reflections is an opinion that the verdict should stand; *and I am the more inclined to this, as the plaintiff is not concluded by this judgment, but may try the matter once more in a new ejectment.*"

The other authorities cited under this head by the learned counsel, being merely to sustain their proposition that, "when influence is *shown* to have *existed*, and to have been *unduly exerted*, the *source* whence it originated is immaterial;" it is unnecessary to notice them.

Before passing to another topic, I will remark, that it is now well settled, both in England and the United States, that a specific performance of even ordinary contracts will not be refused for *mere inadequacy of consideration.* In the case of *Callaghan* v. *Callaghan*, decided by the House of Lords, in 1841, (8 Clark and Fin. 374,) the rule is thus laid down: "Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract."

This was no new doctrine. It was yet more emphatically asserted in *Coles* v. *Trecothick*, 9 Ves., Jr., 245, in which Lord

Eldon said: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to *conclusive and decisive evidence of fraud* in the transaction, it is not itself a sufficient ground for refusing a specific performance."

For a reference to many other cases, both English and American, see *Harris* v. *Tyson*, 24, Pen. St., Rep. 359.

Courts have said that they would not decree the specific performance of contracts, which, nevertheless, they would not annul; but would leave the party to recover his damages at law. But the ground of this distinction fails, and with it the distinction itself, where, in the very nature of the transaction, there can be no remedy at law. In the present case, for instance—assuming the contract to be executory, which I by no means admit—it is plain that no action at law will lie against the plaintiff. To say, therefore, that the contract shall neither be performed or annulled, would be simply absurd; for to refuse its execution would be in effect to annul it. It follows, that the doctrine in relation to annulling contracts, applies to this case; and what that is, we all know. It is very plainly stated in 1 Story's Eq., Sec. 245, as follows: "Inadequacy of consideration is not, then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. * * * If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine, that mere inadequacy of consideration, should form a distinct ground for relief."

These remarks were quoted and approved by the Supreme Court of the United States, in *Eyre* v. *Potter*, 15 How. 60, and the Court held, that "it will not do to set up mere inadequacy of price as a cause for annulling a contract, made by persons competent and willing to contract."

But this case in Howard deserves further attention; for, though it was not about a marriage contract, it was, in some respects, analogous to the present case. I have already shown, that undue

influence and affection are different things, and that the latter upholds, instead of destroying, contracts. And I have also shown that marriage was a part of the consideration here, and that, by the contract, ease, independence, and exemption from care and business were secured to the plaintiff; and I have argued that the extent of Mr. Ross' fortune does not furnish the test of the reasonableness of the contract. And now, bearing these things in mind, I invite your Honor's attention to the following language of the court, in the case just cited: "But the contract between the parties in this case should not be controlled by a comparison between the subject obtained and the consideration given, in a mere pecuniary point of view; added to this, were the motives of affection for the wife of the grantee, the grand-daughter of the grantor; a conviction in the latter of what justice dictated towards the children of the decedent in relation to his property; the prospect of ease and independence on the part of this elderly female; her exemption from the expense, the perplexities and hazards of managing a species of property, to the management of which, expense and energy and skill were indispensable; property, to the tenure of which she entertained and expressed insuparable objections. Here, then, in addition to the sums of money paid, or secured to be paid, we see considerations of great influence, which, naturally, justly, and lawfully, might have entered into this contract, and which we think cannot be desregarded in its interpretation, upon any sound construction of the testimony in the cause."

In *Kirby* v. *Harrison*, 2 O. S. R., 333, the Court said: "In general, where a specific execution would be refused, a rescission will be decreed"—thus placing performance and rescission on the same footing in general.

In view of these reasons and authorities, I submit, that were this a mere "money or property contract," as the plaintiff's counsel call it, it would still be enforced; but when we see that it is a marriage contract, and that the marriage took place, what possible doubt can there be about its enforcement? For, of all contracts known to the law, marriage contracts, followed by marriage, are those most readily enforced by courts; and so much is

their specific execution favored, that even a failure of performance, by one party, of money or property covenants, does not release the other party from performance. (See authorities hereinafter cited.) The rule in regard to enforcing these contracts was clearly stated by Lord Eldon, in *Prebble* v. *Boghurst*, 1 Swanston, 329, in which the specific performance of the contract was decreed, though thereby the children of a second marriage were wholly cut off. His Lordship said: "The case has been represented by the defendants as a case of hardship; the issue of the first marriage claiming all the lands of which the obligor became seized during the second coverture, as subject to the obligation, or, to give it another name, the agreement; but, unless hardship arises to a degree of inconvenience and absurdity so great that the Court can judicially say, '*Such could not be the meaning of the parties*,' it cannot influence the decision."

Are the inconvenience and absurdity of the contract of William Ross and Jane Welsh so great, that your Honor can judicially say, "Such could not be the meaning of the parties?" If not, the alleged hardship, even were it real instead of being fictitious, cannot influence your decision.

Counsel intimate that Mr. Ross' relinquishment of "life rent," in the event of his survivorship, was a *suggestio falsi*, because, as the law then stood, issue was necessary to give curtesy. But the parties intended, that whatever changes the law might undergo, the contract should fix their rights; and it was, therefore, very proper for him to so covenant, that, in any state of the law, he could have no surviving interest in her realty; and the wisdom of that course is shown by the fact, that in a few years after the marriage, the law was so changed as to give curtesy without issue being born. Swan's St., 323, Sec. 17.

But where is the averment in pleading, that she was *misled* by any such suggestion, or that any false suggestion was made to her, or that he knew, and she did not know the law in this particular? There is not a word of the sort in the pleadings, but just the reverse; and therefore it is, that counsel ask your Honor to disregard the pleadings, and decide this case upon an assumed state of facts that their client will not swear to.

III. Of the construction of the contract. The plaintiff's counsel, in their printed argument, have started a point not made before. They say that the contract can only bar the plaintiff of one-third of the personalty; that being the portion given to a widow by the law in force when the contract was made. They admit that the language is broad enough to bar her of all; but they argue that it must be restricted to one-third, for the reason above given. They say that the parties contracted with reference to the then existing law, intending nothing more; and this intention limits the terms used. In reply, I say, that the parties contracted with reference to the law that might be in force *at Mr. Ross' death, in the place where he might then be domiciled;* and that any other construction of their language is not merely unreasonable, but is impossible. And I further say, that it is not admissible to alter or vary this language by matter *dehors;* but were it admissible, there is no matter here that alters its natural import.

And now what was the intent of the parties? To ascertain this, we have only to let them speak for themselves, for they have not left it to inference. They have declared it in the preamble to their covenants, in this unmistakable language: "An agreement between Jane Welsh and William Ross is as follows: Those two individuals intending to become husband and wife, and being the owners of property both real and personal, *and wishing each to retain and control, in the event of becoming husband and wife, the use and disposition of their respective properties, in the event of the death of either,* have agreed, whilst they are equally independent, and free from any undue influence or control of the one over the other, as follows."

Here is an express declaration of their purpose—each party is to retain and control the use and disposition of his or her property, in the event of his or her death—that is, Mrs. Ross may devise and bequeath the whole of hers as she shall see fit; and Mr. Ross, in like manner, may devise and bequeath all his, except the life estate in lots 9 and 23, settled upon his wife.

And in perfect harmony with the declared intention, are her covenants, to wit:

"Jean Welsh, on her part, agrees, and hereby binds herself, to

waive, renounce and relinquish all claim and right of dower in and to the real estate of the said William Ross, to which, by law, she would have right, and to which she would be entitled, at the death of William Ross; and she further agrees, and hereby binds herself to waive, renounce and relinquish all the share or portion of the personal estate of the said William, to which, by law, she would have right, and to which she would be entitled, in the event of his death."

Now, what does she here covenant to release? That "to which, *by law*, she *would* have right, and to which she *would be* entitled, *at the death of William Ross*," or "in the event of his death"—the expressions are synonymous. "By law!" What law? Plainly, necessarily, the law in force at his death; *for by no other law could she have any rights.* To say, as contended for by counsel, that the law of 1846 was meant, would be to render her covenant wholly nugatory. For what she covenants to release are not rights that, in the nature of things, could have no existence, but rights that, but for the contract, would, *by law*, be hers. But the law of 1846, having been repealed before Mr. Ross' death, there could be no rights *under it;* and hence, if she only covenanted to release such rights as *that* law might confer, her covenant has become wholly inoperative by its repeal. The argument of the learned counsel, therefore, proves too much; for, instead of construing, it overturns the contract; and not this contract alone, but nearly every marriage contract that has been made in a State whose laws of descent and distribution have been so frequently changed.

Counsel say, that the parties "cannot be presumed to have had the change of law in their contemplation, or to have provided against it." I don't care whether they contemplated such a change or not; one thing they did contemplate, for they tell us so in this very contract—to wit: that Mr. Ross should control the disposition of his estate, in the event of his pre-decease, her life estate in lots 9 and 23 excepted; and that, on the other hand, she should control the disposition of all her estate, if she should pre-decease him; and they have "provided against" any other construction of their contract: first, by an express and clear de-

claration of their purpose; and, secondly, by covenants that cannot possibly be referred to any other law than that in force at the time of decease.

But they did, in fact, I believe, contemplate the possibility of a change in the law; for the consideration of such a possibility is almost inseparable from a contract of this character: the very object of which is, that the provisions of the contract shall take the place of the provisions of the law that, but for the contract, would distribute the property — namely, the law in force at the time of decease. But the argument does not rest on this general presumption alone, but also on the terms of the contract, and other considerations. Thus, in strict harmony with their declaration of intent, and *providing against* any change of the law, we have Mr. Ross' covenant not to claim life rent; although, as the law then stood, there could be no curtesy without issue born. And, on the other hand, we have her covenant to release all his personalty; though, by the then existing law, a widow could claim but a third. And when we look outside of the contract to the legislation of the State, most fluctuating on this subject about that period, we are strongly impressed with the belief, that no sensible person would have entered into such a contract, without provisions to meet a change. Prior to the Wills Act of 1840, (1 *Curwen*, 691, *sec.* 46,) a husband could bequeath his personalty as he pleased, except that his widow would perhaps be entitled to a year's maintenance. For it was only of personalty, in respect to which the husband died intestate, that a widow was entitled to a portion as distributee. But by the construction given to sec. 46 of that act by some of the profession, if she failed to elect to take under the will she became entitled not merely to her dower as before, but also to distribution. This construction, however, was displeasing to the legislature; and so, in 1842, the old rule was reïnstated, or attempted to be, by a declaratory act. (2 *Curwen*, 896.) The next winter (1843) this declaratory act was repealed, and sec. 46 "revived," (2 *Curwen*, 950,) from which it resulted, that if a man died leaving issue, his widow might take one-third, if without issue, the whole, of his personal estate, by virtue of the statute of distributions, and in despite of

his will. To give her all, was thought by the legislature of 1846 to be wrong; and, therefore, it was then provided that, issue or no issue, she should have but a third. (2 *Curwen*, 1255.) So, in the short period of six years next preceding the marriage of Mr. Ross, the law, upon the very subject of a widow's share of her deceased husband's personalty, was changed no less than four times. Under such circumstances, I think any intelligent man or woman, entering into a marriage contract, would contemplate further changes; and they might well anticipate a change that would give a widow all the personalty, in default of issue—for such had been the law under the acts of 1840 and 1843, and such was still the law in regard to *intestate* estates.

In addition to these various considerations, are the views I have presented in another part of this argument, in respect to the age, character, habits, situation, views and objects of the parties; all showing that the contract, upon our construction, is reasonable, and in strict accordance with the objects and intent of the parties.

A word about the interpretation of contracts. Of course I admit that the object of all interpretation is to discover the intention of the parties, and that that intention, when discovered by such means as the law permits, must govern; if the language of the contract can be made to give it effect. But it is not to be forgotten, that where there is no ambiguity in the terms of a contract, the intent of the parties is to be looked for in those terms alone. It is a rule as old as the law, and as much a rule now as when it was first adopted, that, "quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est," (Broom's Max. 394), or, as it is sometimes expressed, that "it is not allowable to interpret what has no need of interpretation." Hildebrand v. Fogle, cited by counsel, in nowise militates against this rule; for there the contract was ambignous, and upon the interpretation given to it in the court below, was contradictory. It was a contract for carrying the mail, payment to be made "*quarterly;*" and the difficulty was to know what was meant by this word. If interpreted to mean quarterly from the date of the contract, the payments would not fall in the months specified as those in which they were to be

made—if quarterly according to the Post Office division of the year, there would be less inconsistency. It was therefore very proper to hear proof of the usage of the Post Office Department and its contractors, and of the construction which the acts of the parties had placed upon the contract, to aid in ascertaining in what sense the word was used. This is all that that case decides; and there is not a word in it that authorizes a court to enlarge, vary or restrict the language of a perfectly unambiguous agreement—much less to disregard the plainly expressed intent of the parties, written down by themselves in their very agreement, and with which all their covenants are perfectly harmonious.

But if we look outside of this contract for aid in its interpretation, every fact and circumstance we find tends directly to show that the intention of the parties was precisely that which the contract imports.

Wilson v. *Rousseau*, 4 How. 646, does not help the plaintiff. The question there was as to the meaning of the word "renewal" in the following covenant: "And the two parties further agree, that any improvement in the machinery, or alteration, or renewal of either patent, such improvement, alteration or renewal shall inure to the benefit of the respective parties interested, and may be applied and used within their respective districts, as hereinbefore designated."

At the date of this covenant, there was no law for the renewal of a patent beyond the term of the original grant, but it might be done by a special act of Congress. But there was a thing permitted, in the nature of a renewal, to wit: a surrender of a defective patent and the grant of a new one in lieu of it. So there were two modes of renewal then known to the law, or usage; either one of which would satisfy the word "renewal" in the covenant; and hence there was no necessity to resort to the extension for seven years, under the subsequent general law of Congress, to find something for the word to operate upon. In view of *this fact*, and also of the *nature of the property, and of the total absence of anything in the contract manifesting a more enlarged purpose*, the court held that the renewal upon a surrender of the old patent was that contemplated by the parties.

They first, by a statement of the law at the date of the contract, show that the covenant may be satisfied without resorting to the subsequent law. I have shown that the only law that will satisfy the plaintiff's covenants here, is that which was in force at Mr. Ross' death.

They next advert to the nature of the property, saying, "that the parties would *naturally look* to the established system of law on the subject in arranging their several rights and obligations, *in dealing with property of this description*, rather than to any possible change that might be effected by *private* acts of Congress upon individual application." I have shown that the parties to ante-nuptial contracts, like that under consideration, would "naturally look" to the law that might be in force at the time of decease—and that this is especially true in the present case.

They next show, that had the intention been to embrace the provisions of the subsequent law, effect would have been given to that intention. They say: "Contracts are *usually* [not universally] made with reference to the established law of the land, and should be so understood and construed, *unless otherwise clearly indicated by the terms of the agreement.*" I have shown that marriage contracts, like that before your Honor, are exceptions to this usual rule; but were it otherwise, this case comes directly within the above qualification; for here the interpretation for which we contend is "*clearly indicated by the terms of the agreement*"

In conclusion, they remark: "If the parties in this case contemplated any alteration or modification of their rights, more advantageous, by the further legislation of Congress, we think some more specific provision, having reference to it, should have been inserted in their covenant. The term renewal may be satisfied by a reference to the law as it then stood. The patentee might surrender his patent, and take out a new one, within fourteen years; and the term was used, probably, to guard against any question that might be raised as to the right under the assignment in the new patent, if a surrender and new issue should become necessary. The specification accompanying the patent was a complicated one, and has been the subject of much controversy; and the

necessity of a surrender, for correction and amendment, might very well have been anticipated. We think this view satisfies the use of the term, and that no right is acquired in the new grant by virtue of the assignment or covenant."

I have already shown that the contract in question presents no such case as these observations indicate; and that our interpretation, instead of being weakened, in fact finds support in the reasoning and language of the court.

The United States v. *Kirkpatrick*, 9 Wheat. 720, may be more briefly considered. It was a suit on a collector's bond, the condition of which was in the very words prescribed by an act of Congress; and it principally referred, said the court, "as will appear on an inspection of the act, to assessments of direct taxes." Subsequently, Congress extended the duties of collectors, and expressly extended the liability under their bonds, to cover these new duties. This was considered by the court to be a legislative declaration that the previously executed bonds would not cover the new duties; for if they would, the act extending the condition was wholly nugatory. And so, because the first named act showed by inspection—that is, on its face—the limited nature of the condition, and because this limited nature had, in effect, been declared by the subsequent act, the court held that the bond did not embrace the new duties. The case turned upon no general rule whatever; and there is nothing in the decision, nor a word of the court, that applies to a case like the present.

Story's Conflict of Laws, Sec. 276, and *Decouche* vs. *Savetier*, 3 J. C. R. 190, cited by counsel, only affirm the general doctrine that contracts, not relating to realty, are governed by the *lex loci contractûs*. They do not touch the question now under consideration.

Counsel say that this case resolves itself into a bargain for an expectancy, and that Mr. Hunter so admits; and they refer to divers authorities upon that branch of the law. But they misapprehend Mr. Hunter, if they suppose that he means to class marriage contracts with "catching bargains," as purchases of expectancies are frequently called. He merely states the well known principle, (Argument, p. 76,) that Mr. Ross having given a val-

uable *pecuniary* consideration, he stood in the position of a purchaser for *such* a consideration, and not for the mere consideration of marriage alone; and hence the defendants *are not volunteers*. This is indisputably true; but to say that in decreeing a specific performance of marriage contracts, courts require the same adequacy of pecuniary consideration that they sometimes do when called upon to execute bargains for expectancies, would be manifestly untrue. No court or text writer has ever placed the two cases in the same category; but, on the contrary, as already shown, the same courts that regard with suspicion sales of expectancies, favor the specific performance of marriage agreements, and hold that when made by adults, "any provision, however inadequate," will suffice. And there is nothing whatever in Mr. Hunter's remarks that favors any other conclusion.

But suppose it were treated as a sale of an expectancy, what follows? Why, at most, that the contract must be reasonable, or its performance will not be decreed. But the contract here is reasonable; and so, in any point of view, the argument comes to nothing. As to the question of reasonableness, I have only to refer to what I have hereinbefore said. Your Honor will not fail, however, to observe, than even a gift of an expectancy, if unimpeached, will not be set aside.—*Sullivan* v. *Sullivan*, *supra*.

Counsel seem to argue that the specific performance of a perfectly valid contract may be defeated by a subsequently enacted law, which makes it more valuable to one of the parties than it would have been had the law remained unchanged. If this is their meaning, I utterly deny their proposition, and say, not only that it finds no support in any adjudication, but that it directly conflicts with the constitutional provisions against impairing the obligation of contracts. Why, how would such a principle work? Not to multiply illustrations, let us suppose cases that have frequently occurred. A man in possession of land under a defective title, covenants, for a valuable consideration, less however than the actual worth of the land, to convey it to another by warranty deed. Before he makes the conveyance, the Legislature pass a five years' limitation act, like that of 1840, (Swan's St., old ed.

368, § 160;) or a seven years' act, like that of 1849, (Swan's St. new ed. 628, note;) or an act cutting off savings in favor of non-residents, as was done by the act of 1846, (Swan's St. ibid. note;) and thereby the title of the vendor becomes perfect; as many titles were thus perfected; what court could refuse a decree for specific performance on account of this legislation? And yet he might have sold the land for much less than he would have required had his title been good at the time of the sale.

Again: Suppose Mrs. Ross had died after July 1, 1853, leaving her husband surviving, and he had claimed curtesy in her real estate, saying: "True it is, I covenanted in my ante-nuptial contract not to make this claim; but as the law then stood, there could be no curtesy without issue born, and issue of my marriage was impossible. But by the subsequent act of 1853, curtesy is given though there be no issue, and therefore my contract creates no bar"—what court would have listened to him for a moment?

But why do counsel limit their proposition to a change of the law? If subsequently occurring inequality constitutes an objection to specific performance, what matters it how the inequality is produced? A man or woman's fortune may be increased by events quite as unexpected, quite as foreign to their contemplation when executing their contract, as a change of the law. The unexpected death of a relative, an unlooked for bequest, an unhoped for rise in the value of property, an unforeseen success in business, may swell a man's estate tenfold; but who ever heard that it discharged him from his contracts, or extended his liabilities?

Counsel say that we are in a court of equity, not in a court of law. But it is unnecessary to remind your Honor, that contracts are construed in the one court precisely as they are in the other.

But it is useless to pursue this inquiry further, for the whole matter is in a nutshell. It is simply this:

1. The terms of the contract cover the whole property, as the counsel themselves are compelled to admit.

2. These terms are so clear and unambiguous, that they alone can be looked to for the intention of the parties. And that intent is shown not only by covenants that cannot be satisfied except upon our construction, but it is also expressly recited in the preamble

of the agreement. And no case can be found of an interpretation, or construction, of a contract contrary to such an express declaration of intent, the covenants being consistent therewith.

3. But if matters dehors can be looked at, they strengthen, instead of weakening, the natural import of the terms of the agreement.

IV. Before proceeding to consider whether the case is affected, and if so, how affected, by the fact that Mr. Ross did not devise lots 9 and 23 to the plaintiff, I will notice an observation of counsel in respect to her furniture. It is a small matter, and I might safely apply to it the maxim *de minimis*, &c.; but as it may be briefly answered, I will do so. They say: "He nominally surrendered his right to the furniture of the house, but took possession of it all with the house, immediately on the marriage; and by omitting to purchase other furniture to replace it, put it out of her power to withdraw it from his possession, until it was consumed in his use. Indeed, it would have been felt as an unkind act had she withdrawn it; she therefore could not do it without a sacrifice much beyond its value. He might have purchased furniture and brought it to the house to replace hers—she could not request him to do it."

Now, may it please your Honor, there is nothing in the case to warrant this statement, that Mr. Ross would have felt it an unkind act, had the plaintiff disposed of her furniture; and such an inference is utterly repelled by his almost religious regard for the sanctity of contracts, and his extraordinary exactitude in their performance. This was the natural character of the man, strengthened by the unbroken habit of a lifetime; and there probably never was a man who would have been less likely to feel unkindness at being required to perform his engagements. But I can well conceive that Mrs. Ross might have felt it unkind, and with reason, had he deprived her of the use of her furniture by bringing in furniture of his own to displace it, without her request. It requires but little knowledge of womankind to per-

ceive that to ask a woman to send to an auction (for that would have been the effect of his doing what counsel suggest) the articles that her taste had selected, upon which her care had been bestowed, to whose use she is accustomed, and many of which are the work of her own hands, would be anything but a gracious request. Among all the sarcasms that have been uttered against the sex, all the charges made against them of love of change and finery in dress and mansion, I have never seen one accused of desiring to disfurnish her house in order to furnish it no better; and it is not pretended that Mr. Ross should have furnished the plaintiff's more comfortably or elegantly than it was furnished.

But it is unnecessary to argue this question, for it is settled by the pleadings. The answer avers: "That the said William Ross, at all times during his life, after his marriage with the plaintiff, in strict conformity with, and in fulfillment of, his part of said contract, and the said modification thereof, did not, in any way or manner, set up or assert any claim or right, in virtue of said marriage, to any part of the personal estate of the plaintiff; and did leave all of her said personal estate to be managed, controlled and disposed of by the plaintiff herself, as fully and freely 'as if she had not been married to the said William Ross;' and they aver that the plaintiff, at all times during the life of the said William Ross after said marriage, did, in pursuance of said ante-nuptial contract, and in virtue of the rights thereby secured to her, take control over her said personal estate, and did manage and dispose of the same, according to her own will and pleasure, as fully and freely as if she had not been married to the said William Ross; and in so controlling, managing and disposing of said personal property, she, the said plaintiff, of her own free will and pleasure, without any claim of right thereto on the part of said William Ross, took with her and caused to be brought to her, whilst she resided with the said William, after their marriage, so much and such parts of her said personal property as she chose, and used the same according to her own will and pleasure, in the family, subject, at all times, to be removed or otherwise disposed of by her; and in any use or care over the same which may have

been exercised by the said William, at any time, he acted in conformity with her wishes, subject to her direction, and in her behalf; and that both of said parties, at all times, to the day of his death, recognized said ante-nuptial contract as in full force between them, modified as aforesaid."

Not one word of these averments is denied, either directly or inferentially, by the Reply. They, therefore, stand admitted, and leave no question as to Mr. Ross' performance of his covenant in respect to the plaintiff's personalty.

But were it otherwise, there is not one particle of proof that even tends to controvert them, or either of them.

V. It will facilitate the argument and understanding of some of the points hereinafter to be discussed, to now consider whether the contract, in the view of a court of equity, remained executory after the marriage took place, or whether it then became, in equity, an executed contract, either in whole or in part. I say, either in whole or in part; for, obviously, a contract may be in part executed, and in part remain executory; and as to the executed part, it is equally obvious that the principles that regulate the rights of parties in executed contracts, and the action of courts in meddling with or setting them aside, may have full application. 9 How, U. S. Rep., 212. It is true, that the decision of this case does not depend upon the question, whether this contract is to be regarded as executed or executory; for if it is the latter, still it is entitled to enforcement; yet, as an executed contract, is not open to many of the observations of the plaintiff's counsel; and as it will tend to simplify the case to show that, for the purposes of the present investigation, this is such a contract, I will now endeavor to render it manifest.

In considering this point, it is necessary to always bear in mind that we are in a court of equity, dealing with an equitable contract; for what is regarded by such a court, which looks only to the substance and not to the shadow of things, as executed, may

not be so regarded by a court of law, tied down by arbitrary and technical rules.

Now, may it please your Honor, what are the covenants of these parties?

In the first place, "Jean Welsh, on her part, agrees, and hereby binds herself, to waive, renounce and relinquish all claim and right of dower in and to the real estate of the said William Ross, to which, by law, she would have right, and to which she would be entitled at the death of William Ross; and she further agrees, and hereby binds herself, to waive, renounce and relinquish all the share or portion of the personal estate of the said William, to which, by law, she would have right, in the event of his death."

A moment's reflection will show that nothing further, *on the part of Mrs. Ross*, is necessary to give effect to these covenants in a court of equity; for no release, however formal, executed after her husband's death, could render the bar more complete in the eyes of a chancellor, than it is by force of these covenants, if they remain obligatory. *Gelzer* v. *Gelzer*, and *Hardy* v. *Van Harlingen*, supra. There has, therefore, been nothing further for her to do, either during the coverture or since its termination.

Let us now turn to Mr. Ross' covenants, to wit: "The said William Ross, on his part, hereby agrees and binds himself to devise and bequeath, in his last will and testament, unto the said Jane Welsh, in lieu of her dower, in the event of her becoming the wife of the said William Ross, and also his widow, the following described property, to be held and possessed by her for her sole use and benefit during her natural life, the occupancy and enjoyment of which to commence at the death of the said William Ross, viz: all the parts or portions of in-lots No. 9 and 23, in the city of Chillicothe, which the said William Ross now owns and possesses, or which he may hereafter own or possess, with the appurtenances and improvements thereon, or thereunto belonging, or which may hereafter be thereon.

"The said William Ross also waives, renounces, and relinquishes, in the event of the said Jane Welsh dying before him, all claim or life rent, to which he might be entitled by law, in and to the

real estate of the said Jane Welsh, which she now owns, or of which she may hereafter become owner, by devise, grant, or otherwise.

"And he also waives, renounces, and relinquishes all right to possession or control of her personal estate, to which, by law, he might be entitled, during coverture or afterwards; and leaves all her personal estate to be managed, controlled and disposed of by herself as fully and freely as if she had not been married to the said William Ross."

What I have said in relation to the plaintiff's covenants, evidently applies to Mr. Ross' covenants in respect to curtesy and the personalty. In the view of equity, nothing more remained for him to do to bar himself effectually from any right to either. Indeed, his covenants necessarily prevented his marital right from ever attaching to his wife's personalty; and so her title to it remained as good, if not at law, at least in equity, after the marriage, as it was before.

It follows that after the execution of the contract, and the marriage of the parties, there was nothing further for Mr. Ross to do, but to devise the parts of lots 9 and 23 to the plaintiff. But what would such a devise have effected, supposing him to have died seized of that property? Manifestly nothing more than to vest in his widow the *legal* title to property, to which, without the devise, her equitable title would have been perfect. Will any lawyer pretend that, had Mr. Ross died owning that realty, and without devising it according to his covenant, the plaintiff could not have compelled his heirs, or devisees, or a purchaser with notice, as the case might be, to convey to her a life estate therein? I don't think any one will so pretend; for if there is anything well settled, it is that a covenant, upon sufficient consideration, to devise a real estate, will be specifically decreed. 5 Am. Law Reg., 177; 1 Dessau. 116, note; 3 Ibid. 195; 3 Ves., 402; 7 D. and E., 138; 6 Ves., 150; 19 Ib., 71; 5 Ib., 366; 3 Amb., 882; 9 Sim., 644; 9 Com. L. and Eq. Rep., 136; 3 Dessau. 190; 1 Vermt., 48. And that an agreement to settle a jointure will be specifically decreed against a purchaser with notice, see Bright's Hus. and Wife, 473, § 12 and 13.

The plaintiff's equitable title would therefore have been complete; for it is only by force of such a perfect equitable title that she could have obtained such a decree.

But how could it be otherwise on principle or authority? She was a *purchaser* of a life estate in the land; for, *inter alia*, one of the highest considerations known to the law, marriage. Now, the vendee of land, even before payment of the consideration, is its equitable owner. The established doctrine is, that on a sale of land, and before payment of the purchase money and conveyance, the vendor holds the legal title in trust for the vendee, who is the owner in equity; and the vendee holds the purchase money in trust for the vendor. 15 *Barb.* 557; 2 *Wheat.* 577; 10 *Pet.* 532; *Story's Eq.* §§. 789 *to* 792 *and* 1212. *A fortiori* is the vendee seized of the equitable title after payment of the consideration — which is precisely this case. By the marriage the plaintiff paid the consideration. It is true, marriage was not the sole consideration; for her covenant not to claim dower, and also, as her counsel say, her covenant not to claim distribution, entered into it. But as these covenants effectually barred such claims without anything further to be done by her, the whole consideration was received by Mr. Ross the moment the marriage took place; and the plaintiff was a purchaser for an *executed consideration*, and because, *eo instanti*, seized of a perfect and indefeasible estate in equity.

Nor does it matter in the least, so far as the present point is concerned, whether the contingent estate, (contingent, because dependent upon survivorship,) thus vested in her, was or was not alienable by her during the coverture; for, in either case, her title to it was none the less perfect, nor the contract any the less executed. It was, in fact, alienable, if a *legal* jointure is alienable; but whether it was or was not *so* alienable as to remain in a purchaser as a substantive, subsisting and continuing estate, it had, at least, the quality of an inchoate dower right, and could, therefore, be *released* by a statutory deed of husband and wife. And it had these further qualities, that her husband had no interest in, or control or dominion over it; and that by no act save her own, or that of the Almighty, removing her from this world

before her husband, could it be incumbered, aliened or extinguished.

And now, I put it to your Honor, in view of these facts, whether, in the eyes of the chancellor, this was not an executed contract the moment the marriage took place? Why, what was there — in substance, not form, in equity, not *hærens in cortice* law — that remained to be done? What would the plaintiff have had to do to entitle her to a decree for the land, had Ross died the next minute after the marriage ceremony? Nothing. What would he have had to do to secure her estate to her heirs or devisees, had she, not he, died that minute? Nothing. What would a devise of the lots have given her, had such a devise been made? Nothing but a bare legal title to that which she already, in equity, owned. And yet counsel ask a *chancellor*, whose business it is to disregard form and figments, and look only to substance and justice, to call this an executory contract, though nothing substantial remained to be executed, and upon a *scintilla juris*, an imaginary difference, as respects this case, between executory and executed, to absolve the plaintiff from her solemn obligations.

But let us pursue the subject a little further, and mark the difference between this case and those in which something substantial remains to be performed. Counsel say, that this contract rests in covenant; that it is not a settlement, but only a covenant to settle. I deny the proposition, and maintain that, in equity, it is, *per se*, a settlement. Were it a mere covenant to devise *undesignated* lands, as in the Alabama case, *supra;* or to settle lands of a certain value, *not specifying them;* or a rent charge, *without designating* the land out of which it should arise; or were it a mere *personal* covenant, as to settle an annuity; or a covenant to create a trust not accurately defined — each of which cases is frequently met with in the books — counsel would be right in calling it executory; for, in such cases, the covenant cannot, *per se, for want of designation*, or *accurate definition*, vest an estate or property in any *particular* land or money. But where, as in this case, the particular thing is designated, there is no such difficulty; and, if there be no other condition precedent than mar-

riage, which is also this case, the covenant does operate to vest an equitable title in the wife the moment the marriage takes place; and the husband becomes that moment her trustee of the legal title. The intervention of a third person as trustee is unnecessary; for, as said by Story, (2 *Com. on Eq.*, § 1380,) "in all such cases the husband will be held a mere trustee for her; and, although the agreement is made between him and her alone, the trust will attach upon him, and be enforced in the same manner, and under the same circumstances, that it would be if he were a mere stranger. It will make no difference, whether the separate estate be derived from the husband himself, or from a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice." And see *Huber* v. *Huber's Ad'm.*, 10 *O. R.* 372; *Neves* v. *Scott*, 9 *How. U. S. R.* 212.

Here, then, for a valuable consideration, was a trust created, about which there is not the least uncertainty, either to as the parties or the subject matter; a trustee being provided by operation of law, the *cestui que trust* being expressly designated, and the subject matter of the trust—a life estate in well described property—being accurately defined, leaving nothing further to be done by either party to vest in the *cestui que trust* a perfect equitable title. And now, how will this trust be *treated* in a court of equity—as an executory or an executed trust? Counsel say: "A covenant is not executed, *nor a trust created by it*, if it contemplate a *future act* of the covenantor, as if it be a covenant to transfer stock, or, as in this cause, a covenant to devise lands in consideration of a covenant to relinquish dower and distribution." It is, certainly, true, that a covenant to convey or devise is not, literally speaking, executed, until the conveyance or devise be made; though a court of equity, if justice require it, will regard it as executed, on the familiar principle of holding that to be done, which ought to be done; but, to say that such a covenant, *founded on a valuable consideration*, does not *create a trust*, is surely novel doctrine. If this be so, what becomes of the well settled rule, that, upon a sale of land, by articles, the vendor becomes a trustee of the legal title for the vendee, and the latter a trustee of the purchase money,

if unpaid, for the vendor? (See ante, p. 77.) Are there such things as trustees and *cestuis que trust* without *a trust being created?* In order to create the trust, the learned counsel require, it would seem, that the conveyance or devise be actually made; but, with deference, I submit, that that, instead of creating, would *put an end* to the trust, by investing the same person with both the legal and equitable title. In support of their views, they quote a part of a sentence from 2 Story's Eq., Sec. 983, the whole of which I will give, as I humbly think it supports my views. Story says: "And, in the first place, in regard to marriage settlements, where an instrument, designed as a marriage settlement, is final in its character, and the nature and extent of the trust estates, created thereby, are clearly ascertained and accurately defined, so that nothing further remains to be done, according to the intention of the parties; there, the *trusts* will be *treated* as *executed trusts*, and *courts of equity will construe them in the same way, as legal estates of th like nature would be construed at law upon the same language.*"

Now what is here meant by a settlement being "final in its character," and by the expression, "so that nothing further remains to be done according to the intention of the parties?" Is it meant that a conveyance or devise of the *legal* title must be executed to the person upon whom the settlement is made? That is the scope of the learned counsel's observations, but it cannot be so; for then, as above shown, *there would be no trust at all;* and what Story says about the trusts being *treated* as executed trusts, and courts of equity construing them as legal estates are construed, would be sheer nonsense. Is it meant that in order to create the trusts, the legal title must be conveyed to a third person? This cannot be, for the husband may be the trustee, as I have already shown by the same author, as well as by our own reports. What, then, is meant? Story himself has answered, in his note to the above section, 983, where he says: "Lord Eldon, in *Jervoise* v. *Duke of Northumberland*, (1 Jac. and Walk., 550, 551,) has taken notice of the confused and inaccurate senses in which the words executory trusts and executed trusts are often used. In one

sense all trusts are executory, since the *cestui que trust* may call for a conveyance and execution of the trust. *But executory trusts are properly those where something remains to be done to complete the intention of the parties, and their act is not final.*" From this, it appears that the something remaining to be done is not the transfer of the legal title—for to hold that would, as Story says, make *all* trusts executory—but it is something that is necessary in order *to define, perfect or clearly settle the terms or subject matter of the trust.* In England, it is very common to enter into "marriage articles," properly so called, by which a settlement is not finally made, but only an agreement to make a settlement at a future time; the terms of which are frequently left, by the articles, in some degree uncertain, and to be determined by mere contingency or further agreement. Such was the case of *Trevor* v. *Trevor*, and some others cited by plaintiff's counsel; and such cases form one of the subjects of Story's remarks in the section above quoted from. In these cases the trusts are executory, because "something remains to be done to complete the intention of the parties, and their act is not final;" in other words, the trust they intend to create is not yet "clearly ascertained and accurately defined;" and for that reason, and not for want of a conveyance or a devise, the articles are not final. But when the articles, as in this case, leave nothing to be done, in order to ascertain and perfectly define the trust, they are as final as any instrument can be; and the trust created is *treated* in equity as an *executed trust.*

The same principle is stated in Hill on Trustees, 328, as follows: "Where directions are given for the execution of some future conveyance or settlement of trust property, *but the particular limitations are not fully or accurately specified, this is an executory trust;* and in carrying such a trust into execution, regard must be had to the general intention, rather than to the technical import of any particular expressions used. The distinction between trusts executed and executory, though questioned by Lord Hardwicke in an early case, has been long firmly established as one of the settled doctrines of the court. And this doctrine applies equally, whether the executory trust be created by marriage arti-

cles, or by will or voluntary settlement." And, again (page 332): "This at once leads to the observation, that it is only where something is left *incomplete* and executory by the creator of the trust, that equity would mould or modify the words in order to give effect to the intentions of the parties. *For if the limitations of the trust estate are definitely and finally declared by the instrument itself, that will be an executed trust:* and it must be carried into execution as strictly and literally as if it were a limitation of the legal interest."

And so, Lewin on Trusts and Trustees, page 48, "A trust executed is where the limitations of the *equitable* interest are complete and final; in the executory trust, the limitations of the *equitable* interest are not intended to be complete and final, but merely to serve as minutes and instructions for perfecting the settlement at some future period."

Here it cannot be denied that the limitations of the *equitable* interest in the lots to the plaintiff is complete; and, consequently, the trust is executed, not executory.

The same doctrine is very clearly stated and expressly applied in *Neves* v. *Scott*, supra; a case in many respects like the present, and to which I invite the special attention of your Honor. It was a case of an ante-nuptial contract, without the intervention of a third person as a trustee, and without a transfer of the legal title to the property, and its enforcement was resisted on the same grounds here taken, to wit: that it was merely executory in its nature, and the plaintiffs were volunteers. But the court held the contrary, and in considering the nature of the instrument, said: "There is another ground, unembarrassed by conflicting authorities or refined distinctions, which the court are of opinion is decisive of the questions involved in favor of the complainants. And that is, that the deed in question is a marriage settlement, complete in itself—an executed trust, which requires only to be obeyed and fulfilled by those standing in the relation of trustees, for the benefit of the cestui que trusts, according to the provisions of the settlement. The defendants are not called upon to make a settlement of the estate, under the direction of the court, from imperfect and incomplete marriage articles, and which might or

might not be subject to the objections stated. The settlement has been made by the parties themselves; and the only question is, whether the defendants shall be compelled to carry it into execution. The distinction between trusts executed and executory is this: a trust executed, is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust, where the directions are incomplete, and are, rather, minutes or instructions for the settlement." (Page 211.)

And being an executed trust, they say, "the effect must be the same whether the estate is equitable or legal"—and this upon the ground that equity follows the law. (Ib.)

And on the next page they say: "If a third person had been interposed as trustee of the estates, with the limitation as found in the instrument, no one could, for a moment, have doubted but that the settlement would have been final and complete; and yet it has long been settled, that equal effect will be given to it in equity, when made only between the parties themselves; each one will be regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement. (2 Story's Eq. § 1380, Fonbl. book 1, ch. 2, § 6, note n; 2 Kent's Com. 162, 163; 9 Ves. 375, 383; 3 J. C. R. 540.) There can be no objection to the execution of the trust on this ground."

Trevor v. *Trevor*, 1 P. Wms. 622, which plaintiff's counsel call "an *a fortiori* case on this point," in reality does not touch it; for in that case, instead of the trusts being, in the language of Story, "clearly ascertained and accurately defined" by the marriage articles, leaving nothing more to do, they were only partially stated, and were to be ultimately fixed by future direction and agreement. The case was, that Sir John Trevor, by articles, covenanted "with the trustees therein named, *before the end of two years*, to settle and assure upon the said trustees, *as they, the said trustees, should direct and appoint*, all the premises to the several uses in the articles expressed, *as also in the settlement and conveyance, as should be limited and agreed upon by Sir John Trevor and the said trustees.*"

Here, then, the articles, instead of being a final settlement them-

selves, provided for a settlement to be made within two years; and, instead of accurately declaring the uses of the settlement, provided for *other uses not named, but to be agreed upon between Sir John and the trustees, and inserted in the settlement and conveyance* to be made; and the settlement and assurances were to be in such mode and form "*as they, the said trustees, should direct and appoint.*" It was for these reasons that the Chancellor said, and very truly, that the articles were not a settlement, but only an agreement—indeed, they were exactly what is spoken of in Neves v. Scott, as executory; being "imperfect and incomplete marriage articles;" not a settlement, but "rather minutes, or instructions for the settlement."

Nor was the case altered by the covenant to stand seized, which was not, as plaintiff's counsel suppose, a covenant to stand seized *in default of making the settlement*, but to stand seized *until* the settlement should be made—and which was, therefore, considered by the Chancellor as a mere "*provisional*" and *temporary* seizin. Besides, the uses of the seizin were necessarily as *indefinite* as the articles, and not being "clearly ascertained and accurately defined," the trust was executory.

Counsel refer to certain language attributed to Lord Eldon, in *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves., 227, 230; but they have overlooked the fact that, in *Jervoise* v. *The Duke of Northumberland*, 1 Jacobs and Walker, 550, his Lordship, after defining executory and executed trusts, just as I contend for, denied that he had ever used that language in a sense inconsistent with that definition; if, indeed, he had ever used it at all.

Counsel seem to employ the language in 12 Ves., as if it imputed that *every* covenant in *marriage articles* is *necessarily executory;* whereas your Honor will see, by looking at the case, that it imports no such a thing; and that the distinction referred to, was not between executory and executed trusts, but between the rules of interpretation of the language of wills and of articles, when the trusts created are, *in fact*, executory. The distinction alluded to is treated of by Story, (1 Com. on Eq., § 984,) and has nothing whatever to do with the point now under consideration.

It is proper to note here that the quotation in the argument of counsel from 12 Ves., 230, is inaccurate; the words "*to be executed*," which should follow the word "covenant" where it first occurs, being accidently omitted. These omitted words are material, as they show that the Chancellor was speaking of an executory covenant, and not of one that creates an executed trust.

Coleman v. *Sarrell*, 1 Ves., jr., 50, and *Ellison* v. *Ellison*, 6 ib., 662, relates to mere *voluntary* covenants or agreements, *without any valuable consideration;* and the language of the Chancellor is to be understood as limited to such cases; and only affirms the well known rule that a specific performance of a mere *gift*, resting simply in agreement or covenant, will not be decreed. When, for instance, he speaks of a "covenant to transfer stock," he does not assert that such a covenant, *if founded on a valuable consideration*, may not create an executed trust; but only that if there is no consideration for it, if it is a mere gift, it will not be enforced unless a transfer to a trustee has been made. These cases stand on a wholly different footing from those in which, owing to the presence of a valuable consideration, the covenantor becomes, as we have seen, the trustee of the covenantee.

These observations equally apply to the passage quoted from *Bunn* v. *Winthrop*, 1 J. C. R., 337; indeed, that case illustrates what I have said, for the Chancellor, finding a sufficient consideration, held that the deed ought to be supported, whether it would be good or not if merely voluntary. There is nothing, therefore, in either of these cases that militates against us; but, on the contrary, the distinction they draw between voluntary covenants and covenants upon valuable considerations, makes them authorities in our favor.

Johnson v. *Johnson's admr.*, 23 Mo. Rep., 589, cited by counsel, is also a case in our favor; for it shows that where the property *in specie* is settled on the wife, as in our case, though only by articles of agreement, the agreement "may, perhaps, be very well considered so far executed as to be at once, without any thing further, an equitable bar of dower, and to be pleaded as such."

Whenever it is necessary to effect justice, courts of equity will consider that as done which ought to be done, and without regard to time. Thus among the most familiar instances of the application of this principle, are the cases of covenants, or wills, providing for an investment of money in land, or conversion of land into money; in which cases the conversion will be deemed to have taken place so as to change the course of descent, although by the terms of the covenant, or will, it was not to take place until after the owner's death. This presumption is one of the fictions of the law, invented to subserve the ends of justice; and the same reasons that required its invention, forbid any limitation of it that would lessen its utility. In Fonblanque's Eq. Book 1, Ch. VI., § 9, he says: "And as this court is to enforce the execution of agreements, *and regards the substance only, and not forms and circumstances*, it therefore looks upon things agreed to be done as actually performed, as money covenanted to be laid out in land, to be, in fact, a real estate, which shall descend to the heir. So, where money is agreed on marriage to be laid out in land, and settled to the use of the husband and wife for their lives, remainder, &c. * * *; this money is bound by the articles, and shall not be assets to satisfy creditors, but the heir shall have it, as the land should have gone, in case the money had been laid out according to the articles."

And so in this case, the parts of lots 9 and 23 were bound by the articles; and, but for her own act, the plaintiff would have had them, whether actually devised to her or not.

In *Cooke* v. *Cooke*, 2 Atk., 67, Lord Hardwicke said: "Whether the legal estate is in the cestui que trust or in the trustees, it will make no difference; for where there is a covenant that it should be conveyed, this court will consider it as actually conveyed."

In *Sidney* v. *Sidney*, 3 P. Wms., 276, the Lord Chancellor said: "But the articles being, that the husband shall settle such and such lands in certainty on his wife, the plaintiff, for her jointure, this is pretty much in the nature of an actual and vested jointure; in regard what is covenanted for a good consideration to be done, is considered in equity, in most respects, as done;

consequently, this is a jointure, and not forfeitable either by adultery or an elopement."

In conclusion on this point, I repeat, that in the view of a court of equity,

1. Nothing remained, after the marriage took place, for the *plaintiff* to do, to bar herself from dower and distribution.

2. Nothing remained for Mr. Ross to do, to bar himself from curtesy and his wife's personalty. Indeed, by force of the contract, no marital right ever attached to her personalty.

3. The covenant to devise, followed by the marriage, created an *executed trust*, and the plaintiff became thereby the equitable owner of a contingent life estate in the premises, of which she could not be deprived save by her own act or her pre-decease.

4. That this equitable estate has the same effect in a court of equity as would a legal estate; that, in the language of Lord Eldon, 1 *Jac. & Walk.* 550, approved by the Supreme Court of the United States, and applied to a case like the present, in *Neves* v. *Scott*, 9 *How.* 211, "the effect must be the same, whether the estate is equitable or legal."

5. That a *legal* title to the contingent life estate, if vested in the plaintiff, would have made a perfect *legal* jointure, and she would have been barred both at law and in equity. That in a court of equity, the equitable title has the same effect; and so there was a perfect equitable jointure and bar.

6. That if a legal jointure is alienable, so was this; for, equity following the law, equitable estates have the same qualities of alienability as legal estates; but whether it was or not so alienable as to remain in the hands of the alienee a subsisting estate, is immaterial; for it was, at least, extinguishable by a statutory deed as fully as inchoate dower is extinguishable.

I have so far argued, as if the plaintiff's covenants would be regarded as executed only by a court of equity, which would not regard any further release as necessary. But I shall presently show, (see post, heads X, XI and XII,) that her covenant, in regard to the *personalty*, operates, *per se*, even *at law*; the effect

of it being *to prevent any right to distribution from ever attaching;* that, in respect to distribution, she is, in the language of the books, "*considered as dead;*" and that, consequently, she cannot get distribution, unless this Court *confer* it upon her by *setting her contract aside.* Your Honor is not called upon to bar her by enforcing performance of an *executory* covenant into which she has entered; but to relieve her from an *existing* bar by by avoiding the covenant that creates it.

VI. The plaintiff, having joined in the conveyance to Marfield and others, is not remitted to dower or distribution, but remains barred.

Whether her life estate was her separate property, technically speaking, or not — whether she could alien it so as to vest a substantive estate in her alienee or not — whether the post-nuptial contract is valid or not — this proposition is true. It is a proposition that steers clear of all difficulties raised, or that can be raised, out of matters occurring subsequent to the marriage — it needs no support from them, and it cannot be prejudiced by them — it needs no post-nuptial agreement, no *valuable* consideration, to uphold it; but would be impregnable, had no such agreement been made, no compensation been promised or given.

It is not pretended that the plaintiff was induced to join in that conveyance by any improper means whatever, or that she did not fully understand that she was thereby parting with all claim to the property it conveyed. In the absence of averment and proof to the contrary, the law presumes *bona fides* and understanding; and this presumption is strengthened, in the case of a married woman's deed, by the fact, that she undergoes a privy examination; has the instrument explained to her fully by the officer of the law; and declares that she executed it of her own free will, and is still satisfied therewith. And this presumption obtains, even though the transaction be a gift to the husband — for fraud or undue influence will not be inferred from the mere relation of husband and wife. (*Lewis* v. *Baldwin*, and *Hardy* v. *Van Harlingen, supra.*) But here we are under no necessity of relying

on presumptions, however sufficient; for the answer avers that there was no deceit, fraud, or undue influence, practiced in these post-nuptial matters; and this averment is not merely admitted by a failure to controvert it, but the Reply affirmatively shows that the transaction was *bona fide* and understood. And here I may remark, that it matters not, upon the point now to be considered, whether the idea of selling the property originated with Mr. Ross, or with the plaintiff; or whether the sale was the result of her importunity, or was made at his desire, with her simple acquiescence. In either event, she executed the conveyance voluntarily, and that is all that is necessary.

I have next to observe, that the conveyance extinguished her interest in the property; and this wholly irrespective of the doctrine of separate estate — for it was an instrument prescribed by statute as sufficient to transfer any estate, and, as it contains her covenant of warranty, she is effectually estopped to set up title against it. *Hill's lessee* v. *West*, 8 O. R. 222.

The transaction, then, being unimpeached, and the conveyance being effectual to deprive her of the estate in the lots that had been settled upon her, the question arises, is she thereby remitted to dower and distribution?

Had her title to her jointure been a *legal* title, her counsel concede that she would not be remitted; and they seem also to admit, as the result of the authorities, that if the case is one of "equitable jointure *executed*," she is not remitted; but that it is such a case they strenuously deny, and plant themselves upon the proposition that it is one of mere executory, dependent covenants. That this is a wrong classification of the covenants, has been well shown by my associates, and will be further shown hereinafter; but for my present purpose, it is sufficient that, whether the jointure was executed or executory, the plaintiff remains barred. I might, indeed, rest the case upon the learned counsel's admission, that if there be "an equitable jointure executed," that is enough; for a clearer case of an executed trust, I humbly submit, is not to be found in the books. It cannot be denied, that, both in law and in fact, the contract was executed, so far as the plaintiff's per-

sonalty was concerned, nor that a court of equity would have held Mr. Ross barred of curtesy, had he survived the plaintiff; and that, consequently, so far as *her own estate* is concerned, the case presents an executed agreement. But were it otherwise, it would not follow that the covenant to settle upon her a life estate in his realty, is not an executed trust; for, as was said in *Neves* v. *Scott*, 9 How. 212, "in order to effectuate their intent, one part of the instrument even will be taken as a complete settlement of the estate comprised in it, and another part as mere articles." And, in truth, the plaintiff's counsel in effect admit, (Argument, p. 59,) that the covenant did create an executed trust—and therefore an "equitable jointure executed"—by saying that: "The husband's covenant to devise, &c., in the ante-nuptial contract, *was, in equity, real estate.*"

Indeed, may it please your Honor, I feel that I have bestowed too much labor, and occupied too much space, in the discussion of this question of executory and executed; the whole thing, so far as it is material to the case, being in a nutshell. *For one all-sufficient fact cannot be controverted, and that is, that at the time the plaintiff joined in the conveyance to Marfield and others, she was seized in equity of a perfect contingent life estate in the premises, of which she could not be deprived, except by her own act.*

And now let us turn to some authorities, for, although the admissions of counsel might well relieve me from citing them, it may nevertheless be profitable to do so.

And, first, as to Equitable Jointures.

In 1 Bright's Hus. and Wife, 446, ¶ 35, it is said: "But it seems that a trust estate, being equally beneficial to the widow as a legal estate, both in certainty of duration and in profit, will be considered in a court of equity as a good jointure within the meaning and spirit of the statute; so that, if the woman be of age at the time of the marriage, and lands are vested in trustees prior to the coverture, to pay to her the rents of them for life, or a rent charge out of them from the death of her husband in satisfaction of her dower, that will be a good equitable jointure and bar her of dower." And it is the same, though there be no such

conveyance to a trustee; for the husband, and whoever derives the legal title from him, save innocent purchasers, is a trustee.—Story's Eq. § 1380; 9 How. 212.

But it is not necessary that there be an *executed* trust to make an equitable jointure. Thus, Bright, 448, ¶ 5: "The jointure will be equally good and binding upon the husband and wife, and bar her of dower, if it be not absolutely and completely settled upon her by deed, but rest *merely in covenant or articles before the marriage,* because a court of equity will decree a specific performance of such a covenant or articles, by directing a settlement which will have relation to the period when it ought to have been made."

And, again, page 456, ¶ 5: "According to Mr. Roper, the points decided in the above case, (Drury v. Drury,) appear to be as follows: 1. * * *. "2. That a covenant to make a jointure which would be good at law if it had been actually settled, will have the same effect in equity."

Here, then, in any view of the case, was a good equitable jointure, constituting a bar, when the conveyance was made to Marfield and others.

And now as to the effect of that conveyance.

First. It passed or barred her interest in the lots, as I have already shown, and as is laid down expressly in 1 Bright's Hus. and Wife, 464, ¶ 9, where it is said: "The old law allowed the wife during the marriage either to pass and bar the whole interest in the lands settled upon her in jointure for her life, or to charge them in favor of her husband, by concurring with him in a fine." By "old law" is here meant the law of conveyances by *fine*, or *recovery*, which has been abolished by Parliament, and a statutory deed substituted, (2 Bright, 45, ¶ 2; 47 § 10,) by which, as in Ohio, the same thing is now effected.

And even were the contract as executory and the covenants as dependent as counsel contend, that would not avail the plaintiff; for the effect of the conveyance was *to release and extinguish the covenant to devise.* Whether she had power to release it in any other mode, it is not now material to inquire—it suffices that

she could release it by joining with her husband in a statutory conveyance of the land, and that she did so release it. This proposition would seem to be sufficiently obvious; and besides, it is recognized and supported in the books. Thus, in Bright, vol. 1., 467, ¶. 16: "But the wife being disabled during the coverture to relinquish or part with any interest in real estate, except formerly by fine or recovery, and now by a statutory deed, (as will hereafter be shown,) she cannot, by any act *in pais*, prejudice or bar herself of her title to her jointure; if, then, the jointure be secured by a *bond*, and she cancel or deliver it up, or *otherwise than by the means which the law allows her to dispose of real estate*, attempt to release or convey her jointure in her husband's lands, such methods will be ineffectual for the purpose." That is, she cannot release the bond by canceling and delivering it up; but she may do so by joining in a conveyance of the land it covers.

Secondly. The plaintiff was not remitted to dower and distribution; both which stand on the same footing, as is abundantly shown by the cases cited as well as by reason.

On this point, Coke says (1 Co. Lit., 36, b., 1 Thomas Coke, 614, margin): "If a jointure be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her jointure, she shall not be endowed of any of the other lands of her husband. But if the jointure had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally *waivable*, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the jointure of the wife made before marriage, was *not waivable* at all."

I ask the particular attention of your Honor to the reason of the rule here given; for it shows conclusively that the rule rests upon no distinction between legal and equitable jointures, but on a principle that is equally applicable to both. In the case of ante-nuptial jointure, whether legal or equitable, the widow has no election between the jointure on the one hand, and dower or dis-

tribution, or both, on the other. She is barred of the latter by a jointure that is "not waivable"—and if she part with the jointure by joining with her husband in an alienation, (which is her voluntary act,) there is nothing in the transaction to restore her to dower and distribution. If she unite in the conveyance for a consideration received or to be received, she is entitled to that consideration, even if moving from her husband, and even as against his creditors; upon the same principle that a wife releasing her dower for a like consideration, is similarly entitled. (7 Pick., 533; 3 Paige, 440). But she is entitled to nothing more; for it is just as competent for her to release her jointure, without pecuniary consideration, and for mere love and affection for her husband, as it is for a woman to release her dower under like circumstances, which is of every day occurrence; and if she may give her own estate to her husband, as in *Lewis* v. *Baldwin*, and *Hardy* v. *Van Harlingen*, there is certainly no reason why she may not relinquish her interest in his.

But where the jointure is *wholly* post-nuptial—having no connection with any ante-nuptial agreement—the widow has an election to take the jointure or dower, &c.; and it matters not whether this election be made during the coverture, by joining her husband in an alienation of the property, or whether it be made after his decease.

Your Honor will find all this substantially set forth in 1 Bright, 465, ¶. 10; and what is also deserving of notice is, that he lays down the rule and the reasons for it, unqualified by any distinction between legal and equitable jointures, though treating of both. The passage is in the same chapter, and closely following and connected with the sections that treat of both kinds of jointure, and after stating the rule he notes the cases to which it has no application; but he nowhere so much as hints that equitable jointures, whether executed or executory, are withdrawn from its operation.

Nor will your Honor fail to observe, that the learned counsel of the plaintiff, produce no case that sustains the distinction they set up; although, were any such distinction recognized, it would certainly be found in the multitude of jointure and dower cases

in the books, and would hardly escape the vigilant eyes of counsel so well read and diligent. *I say they produce no such case; for in not one of the cases cited by them, had the wife joined in an alienation of her jointure; and therefore, plainly, the cases have no manner of application to the point I am considering.* On our part, we present abundant authority, direct to the point, that where she joins in such an alienation she is not restored to dower or distribution—on their part, they present none whatever.

And now, may it please your Honor, let us look, for a moment, at the equity of the thing. Had the plaintiff been vested with a *legal* title to the life estate, to which she had a perfect equitable title, it is conceded by her counsel, that the alienation to Marfield and others, and the consequent failure to make the devise, would not have remitted her to dower or distribution. But, as said in 1 Bright, supra, a trust estate was, in all respects, as beneficial to her as would have been a legal estate; and I defy any man to show wherein she would have been benefited, at the time of that alienation, by the legal title being vested in her. What possible reason, then, can be given, worth a moment's consideration of a Chancellor, why she should be remitted in the one case any more than in the other? There can be none, unless the whole theory of equity jurisprudence has been changed; and instead of disregarding non-essentials and looking only at substance, it has become the duty of a Chancellor to seize hold of figments to enable parties to perpetrate frauds. Had she been seized of a legal estate, even a court of *law* would hold her barred; but in a court of equity, an equitable title is of equal validity with a legal one; and, as declared by Lord Eldon and the Supreme Court of the United States, supra, shall have equal effect.

Had she given to her husband the benefit of the estate, by joining in the alienation without compensation, the authorities unanimously declare that she would still have remained barred; but instead of this, she gets for her mere life estate over $1,500 more than he received for the entire fee simple. And yet she claims that this alienation, which would never have taken place without her assent, which could not have extinguished her estate

without her concurrence, for which she agreed to receive compensation, and is more than compensated, shall remit her to dower and distribution—a claim whose iniquity no sophistry can hide, and resting on a distinction without a difference, that no court has ever recognized.

I repeat, then, that the plaintiff's having joined in the conveyance to Marfield and others, is decisive of this case; and that whatever may be thought of the Post-Nuptial contract, the question of "Separate Estate," the doctrine of Performance, or the application of Estoppel, this point, which needs none of their support, is perfectly impregnable.

VII. Of Performance. Independently of the point I have just considered, the failure of Mr. Ross to devise the life estate in the lots, does not entitle the plaintiff to distribution; and this for several reasons, some of which I will now present, leaving others to be adduced under subsequent heads.

1. Looking to the contract, it will be observed that the first covenant of the plaintiff is to relinquish dower, and that, corresponding to this, is the first covenant of Mr. Ross to devise the life estate "*in lieu of her dower.*" The remaining covenant of the plaintiff is to relinquish all claim to his personalty, and corresponding to this are his covenants to relinquish curtesy and all claim to her personalty. The order of these covenants, then, and the express declaration that the devise is "in lieu of dower," require an interpretation that treats the pecuniary considerations on either side, not as an entire consideration for each of the covenants on the other side, but as distinct considerations; part of them going to one of the covenants and part of them to the other; and, upon this interpretation, the pecuniary consideration for the covenant to devise, does not embrace the plaintiff's covenant not to claim distribution, but only the covenant not to claim dower—marriage, of course, entering into the consideration of each and all of the covenants. The only difficulty in the way of this interpretation, is the language

preceding Mr. Ross' covenants, to wit: "In consideration of the foregoing stipulations on the part of Jane Welsh, the said William Ross, on his part, hereby agrees," &c. But this language is not as explicit as the words "in lieu of dower," and does not necessarily imply that her covenants, *in their entirety*, are the consideration for *each* of his; on the contrary, it is perfectly reconcilable with the interpretation for which I contend. Suppose that after these words, the contract had gone on to state expressly that the release of dower was the consideration of the covenant to devise, (which, in fact, is the import of the words "in lieu of dower,") and that the release of distribution was the consideration of the other covenants of Mr. Ross: there could then be no doubt about the question, notwithstanding the generality of the expression preceding his covenants. But if the same thing is fairly inferable from the whole instrument, it is just as good as if it were expressed, (Broom's Max. 442, margin,) and much more stubborn language than this has been made to yield to the rule, "*ex antecedentibus et consequentibus fit optima interpretatio.*" 2 Inst. 173; Broom 442 to 456, margin. The construction is not then to be governed by the strict letter of this general sentence, which admits of two interpretations, and to which the familiar mode of interpretation, "*singula singulis*," may well apply; but your Honor will look at what precedes and follows it; and if it is fairly inferable from the order of the covenants, and the distinct and unambiguous declaration of the devise being in lieu of dower, that the release of dower, and not of distribution, is the pecuniary consideration for the covenant to devise, your Honor will so hold. And in considering this question, your Honor will observe that there is another rule of construction, material to be noted, which would be violated by any other interpretation than that for which I contend—namely, the rule that requires effect to be given, if possible, to all the words of an instrument—for upon any other interpretation that can be adopted, the words "in lieu of dower" are useless and nugatory.

If I am right, then, in the view I take of the contract, the utmost effect that could result (were all other difficulties removed) from the failure to devise, would be a restoration to dower, leav-

ing the bar of distribution, which depends on considerations *actually executed*, remaining intact.

It was said at bar that this interpretation would make the pecuniary consideration for the release of distribution extremely inadequate; but there is no foundation for this objection—first, because marriage is itself a sufficient consideration; secondly, because, as the books say, any provision, however small, that an adult woman agrees before marriage to accept, is sufficient even for a release of dower, and *a fortiori* for a release of personalty, to which the marriage gives no title; and, lastly, because the reasonableness of a marriage contract is never to be determined by weighing the separate considerations of separate covenants, but by inquiring whether, upon the whole contract, a reasonable provison is made for the wife. The consideration of a particular covenant may be very small, and of another, extravagantly large, considered *per se*, but neither covenant will, for that reason, be stricken out; the question of reasonableness not depending on the adequacy of a particular consideration, but on the aggregate of them all.

2. If the covenant to devise does enter into the consideration of the plaintiff's covenant to renounce distribution, then that consideration is three-fold, to wit: 1. Marriage; 2. Ross' covenants to let her own and enjoy her own property; 3. His covenant to devise the lots.

The first two considerations have been fullly executed, and she has reaped the benefit of them. The last covenant has not been literally performed, but compensation, more than equivalent to the value of the devise, is provided by the will, and tendered.

Under these circumstances, and independent of the validity of the post-nuptial agreement, she is not remitted to dower or distribution, but remains barred by her ante-nuptial covenants; and this upon the well settled principle, that where a covenant goes to but a *part* of the consideration, and its breach may be compensated in damages, (or, in the language of chancery, "compensation may be made,") and the residue of the consideration has been paid or performed, the other party remains bound, notwithstanding the breach.

This point has been so ably presented by my associates, is so reasonable in itself, and is so well fortified by authority, that I should have no excuse for dwelling upon it, were it not my duty to notice the cases cited by the plaintiff's counsel, and to call attention to some very serious errors into which they have fallen. This is rendered the more necessary by the fact, that, owing to a defective statement of cases, to quotations separated from the context necessary to their comprehension, and to a general appli-plication of remarks that were not intended to be general, the argument of the learned counsel is unintentionally made to convey, I humbly think, a most erroneous impression of the law. Under such circumstances, a prolixity, that would otherwise be inexcusable, will, I trust, be pardoned; especially as I shall seek to avoid all unnecessary repetition of what my associates have said; and shall ask your Honor to take their remarks and mine, not separately, but in connection, for a full presentation of our views.

The rule to which I have referred, is established by numerous cases, both English and American; and if there is a single case in which it has ever been denied, neither our diligence, nor that of our more learned adversaries, has been able to discover it.

Upon a full review of the cases, the rule is thus stated by Sergeant Williams, in his note to *Pordage* v. *Cole*, 1 Saunders' Rep. 320 *b*: "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, *it is an independent covenant;* and an action may be maintained for a breach of the covenant, on the part of the defendant, without averring performance in the declaration."

The leading case on this subject is *Boone* v. *Eyre*, 1 H. Bla. 273, note (a); and for that reason, and because it illustrates the principle with great clearness and force, and has been more frequently cited, and with approbation, than any other case, I quote the statement of it given by Sergeant Williams, in the above-mentioned note in Saunders — being a briefer and clearer statement than I could make myself:

"As where A. by deed conveyed to B. the equity of redemp-

tion of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy. And B. covenanted, that A., *well and truly performing all and everything therein contained* on his part to be performed, he would pay the annuity. In an action by A. against B. on this covenant, the breach assigned was, the non-payment of the annuity: Plea — that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title to convey. The court of K. B., on demurrer, held the plea to be ill; and added, that, if such plea were allowed, any one negro, not being the property of A., would bar the action. — East. 17, Geo. 3, K. B.; *Boon* v. *Eyre*, 1 H. Blac. 273, note (a). The *whole* consideration of the covenant, on the part of B., the purchaser, to pay the money, was the conveyance by A., the seller, to him of the *equity of redemption* of the plantation, and also the *stock of negroes* upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to part of the consideration — namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes."

Campbell v. *Jones*, 6 T. R., 570–573, is another clear case. There, in consideration that the plaintiff would transfer to the defendant a right to use a patent for bleaching, *and* would *also* instruct him in the mode of its use, the defendant paid him £250, and covenanted to pay 250 more. The plaintiff having transferred the right, but failed to give the instruction, brought suit for the money. The defense was the non-performance of the covenant to instruct. But the Court overruled it, Lord Kenyon saying (after citing *Boone* v. *Eyre* with approbation): "So here the covenant to teach is but *part* of the consideration of the £500; for not doing which, the defendant may recover a *recompense in damages*. And the agreement of the plaintiff having been executed in part, by transferring to the defendant a right to

exercise his patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by the plaintiffs not having instructed him. For these reasons we are all of opinion that judgment must be for the plaintiff."

In *Bennet* v. *The Exs. of Pixley*, 7 J. R., 249, the rule was applied and the case decided by it, the Court saying: "Assuming that there was a covenant, on the part of the plaintiff, to pay for the amount of the appraisement beyond the 400 dollars, yet it only went to *a part* of the consideration; and the rule *is settled*, that where mutual covenants go only to a *part* of the consideration, and a breach of that part may be paid for in damages, the defendant *shall not set it up as a condition precedent. The covenants in such case are to be regarded as independent.*"

But it is unnecessary to go abroad for decisions upon the point; for it is firmly settled by the rulings of our own Supreme Court. It was recognized in *Courcier et. al.* v. *Graham*, 1 O. R. 330, Judge Hitchcock observing that it was "*consistent with reason, justice, and common sense;*" and, in 1854, the case of *Tomlinson* v. *Trevitt*, was expressly decided by its application. The original action was by Trevitt against Tomlinson, on the following instrument: "One year after date, I promise to pay William Trevitt eighteen hundred dollars, with interest after six months; also to pay the balance due Perrin & Darst, of Dayton, of about two hundred dollars, on a note given for goods in December, A. D., 1845; in consideration of a stock of goods in the store at Bryan, included in the inventory, together with the notes, accounts, due bills, &c., included in the list, made by Jesse Green and Henry Trevitt, *and a release of obligation, as security to said Jesse Green, at the time the payment to William Trevitt is made*, the claims received without recourse on account of insolvency.

"Bryan, Oct. 2, 1847. GILES H. TOMLINSON."

The obligation from which Tomlinson was to be released, as above, was for $1,800; and the release was, therefore, by no means, a trifling matter.

The defense was, that Trevitt had failed to procure the release;

but the District Court overruled it and gave judgment for him; and the Supreme Court unanimously affirmed the judgment, on the express ground, that as his undertaking to procure the release was but a *part* of the consideration, a breach of which might be compensated in damages, and as the residue of the consideration, the goods, &c., had been received by Tomlinson, the defense was unavailing. Owing to the departure of the judges to their circuits, the opinion in this and several other cases decided at the same term, was not written out, and hence the case is not in the volume of reports; but, if desired, I will furnish your Honor with the arguments of counsel, and a note by the Reporter of the point decided.

Our learned adversaries quote Lord Kenyon's remark in *Goodison* v. *Nunn*, that "the old cases cited by plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense;" and a remark, as they say, of Lord Mansfield, in *Kingston* v. *Preston*, about a defendant being obliged, "in spite of his teeth," to give personal credit to the plaintiff; and some observations of Lawrence and Le Blanc, J.J., in *Glazebrook* v. *Woodrow;* but they surely do not mean it to be understood that these judges referred to the case of *Boone* v. *Eyre*, or meant to depreciate the rule established by it. That rule was established by Lord Mansfield himself and his associates, who decided the case of *Boone* v. *Eyre;* and, as we have already seen, was approved by Lord Kenyon in *Campbell* v. *Jones*, supra; and surely these judges did not speak of their own decisions as outraging common sense, or as compelling a man, in spite of his teeth, to give credit to another. "The old cases cited by plaintiff's counsel," referred to by Kenyon, are those cited by counselor *Wood*, (4 T. R., 762, 763,) and were decided more than a century before *Boone* v. *Eyre;* and as to the remark attributed to Lord Mansfield, I can't find any such thing in *Kingston* v. *Preston*, in the report in Douglas, to which we are referred, nor in Williams' Abr., where the case is also reported. But one thing is certain, that if he did use that language, in *Kingston* v. *Preston*, he could not have alluded to *Boone* v. *Eyre;* for it was not until four years afterward that the latter case was de-

cided—*Kingston* v. *Preston* being decided in the 13th, and *Boone* v. *Eyre* in the 17th year of George III. Besides, *Kingston* v *Preston* in no wise involved the rule in question, and no reference whatever was made to it in that case. That was an action by a vendee against a vendor, on a credit sale of the good will and stock of a mercer; the vendee covenanting, at or before delivery, to "cause and procure good and sufficient security to be given" for the purchase money. The plaintiff avered a readiness, at the proper date, to perform; and assigned non-delivery by the vendor as a breach of the covenant to deliver. Plea—That the plaintiff did not offer or give sufficient security. Demurrer to plea. For the plaintiff, it was contended that he was entitled to the delivery without giving security at all; a construction so repugnant to both the language and sense of the agreement, that Lord Mansfield might well have characterized it as a proposition "that the defendant, in spite of his teeth, shall be obliged to give personal credit to the plaintiff"—and if he did use that language, it was probably in that way.

The modern cases, on the subject of dependent and independent covenants, beginning with *Kingston* v. *Preston*, are perfectly harmonious in the *principles* they enunciate, whatever errors may have occurred in the application of the principles. They clearly establish the following propositions:

1. That where a covenant is to do a *single* thing, (*ex. gra.* to pay $1,000,) and it constitutes the *entire* consideration for the covenant of the other party, and it is to be performed *at or before* the time when the other party is to perform, its performance is deemed to be a condition precedent, unless there is something in the contract to show that it was not so intended—and this upon the presumption that the parties so designed. Hence, in the absence of any valid excuse for non-performance, such a covenant must be *fully* performed, or the other party will not be required to perform.

2. But where the covenant is to do *two or more* things, or there are *separate* covenants to do *separate* things—which, taken altogether, form the consideration for the covenant of the other

party—and they are of that nature that a breach of them can be compensated in damages, they are deemed to be *independent* covenants, unless it *clearly* appears that such was not the intention of the parties. Hence, in this class of cases, although there has not been full performance, yet if there has been *part* performance in a *substantial* particular, the other party will be required to perform. This is the rule *at law*, even where there has been no tender of compensation; the party required to perform being left to his cross action to recover his damages.

3. But a court of equity, having a larger discretion in decreeing a specific performance, will, in general, require compensation to be made as a condition of such a decree; and hence, where, owing to the insolvency of the defaulting party or other cause, compensation cannot be made, the other party will not be required to perform.

4. Marriage contracts, however, are, in some respects, exceptions to the rule requiring performance or compensation, and a party to them will often be decreed to perform, regardless of the other party's default, or the want of compensation.

These principles are established by the authorities already referred to, and others that will be cited; and, bearing them in mind, it will not be difficult to show that not a single case cited by our learned adversaries, in the least militates against them, or is inconsistent with the proposition for which I am contending. With as much brevity as possible, and relying mainly on your Honor's examination, I will now refer to the cases and endeavor to make good this assertion.

Kingston v. *Preston*, *Goodison* v. *Nunn*, and *Glazebrook* v. *Woodrow*, were not marriage contract cases; and as to the first named, I have said all that is necessary.

Goodison v. *Nunn*, was an action for a penalty, and the case is thus stated in Lord Kenyon's opinion: "The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay £210; and if he did not carry the contract into execution, he was to pay £21. And now, not hav-

ing conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty."

Here was no covenant going to a *part only* of the consideration, nor any *part performance*, for each of which reasons the case is not in point.

In *Glazebrook* v. *Woodrow*, there had heen a part performance, but it was in an immaterial particular of scarcely any value, perhaps none. "The very substance of the consideration," to use Lord Kenyon's language, "the material part," as Le Blanc, J., said, remained unperformed; and, looking at the terms of the agreement, it was unreasonable to suppose that the parties intended their covenants to be independent.

But how different is this case? Here, the principal consideration, as the books justly call it, the marriage, was executed, and from it there resulted to the plaintiff the valuable pecuniary advantage of ten years' support, (to say nothing of the rents and the rebuilding of her house.) In addition to this is the executed covenant in respect to her personalty, which, but for the contract, would have been her husband's, and which, with its increase, exceeds $7,600. So, here, looking at nothing but monetary results, it is evident that much the greater part of the pecuniary consideration has been paid; and full compensation is tendered for the residue.

And as to the *intention* of the parties, there is not a word in the contract to show that they meant their covenants to be in anywise dependent, nor was there the least necessity for their being so. In *Boone* v. *Eyre*, "the defendant covenanted that, *the plaintiff performing all and everything therein contained on his part to be performed*, he, the defendant, would pay the annuity," and yet these words, so strongly importing that full performance was a condition precedent, were held to be insufficient to rebut the presumption arising from the fact that the annuity was but a part of the consideration. But there are no such words, or anything like them, in the present case. The plaintiff's covenants stand wholly disconnected from any statement of consideration, except that of marriage and the desire of the parties respectively to control their respective estates recited in the preamble. The purpose to marry, and the desire to withdraw their prop-

erty from the operation of marital law, being stated, the plaintiff proceeds, at once, to covenant; without one word, in any part of the agreement, implying an intention that the performance of her covenants should be dependent on the performance of her husband's.

Nor was there, as I have said, the least necessity for making them so. For as to Mr. Ross' covenants, in respect to *her* property, they would operate *per se*, and needed no guaranty for their faithful execution; to say nothing of her confidence that he would faithfully observe them, or of the fact that his estate was amply sufficient to compensate for their breach. Then, as to his covenant to devise her the lots, that also needed no guaranty; for the covenant itself, the moment the marriage took place, gave her an equitable estate as beneficial as a legal one; of which she could not be deprived, save by her own free act, and by virtue of which, if she saw fit to retain it, she could, at any time after Mr. Ross' death, call in the legal title if she desired it. She had nothing whatever, then, to gain by making the covenants dependent, nor anything to lose by their being independent; and there not being a word in the instrument implying dependency, and the case falling directly within the rule that covenants going to a part only of the consideration are deemed independent, there is not even a shadow of a ground to say that the parties meant them to be dependent. Parties are presumed to contract with a knowledge of the law—a presumption that cannot be rebutted except in cases of fraud, and which there is nothing in this case to rebut, even were it allowable to do so—and thus contracting, to suppose that these parties intended, that after Mr. Ross had fully executed his covenants in respect to her property, and she had thereby retained the complete ownership of *that*, she should become entitled to *his property too*, for want of a devise that would confer no advantage, that would only clothe her equitable with the figment of a legal title, without rendering it one whit more beneficial, would be to suppose that these people were fitter subjects for a lunatic asylum than for the responsible estate of matrimony into which they were entering.

Hastings v. *Dickinson*, *Gibson* v. *Gibson*, (7 and 15 Mass.,)

and *Vance* v. *Vance*, (8 Shepley,) were all cases *at law*, and were not decided, as counsel suppose, on equitable principles; nor did the facts bring them within the rule I am considering.

In *Hastings* v. *Dickinson*, the stipulated provision for the widow was an annuity. It was the *whole* consideration for her covenant not to claim dower, and it *wholly failed;* her husband dying insolvent. So the effect of part performance, and of the breach of a covenant going to a part only of the consideration, was not involved in the case, and not one word is said about it.

Gibson v. *Gibson*, was a like case—a covenant to pay an annuity being the *whole* consideration for the woman's covenant, and there being *no averment of performance, either full or partial.* Of course the case is not in point, but there are some dicta of the Judge who delivered the opinion, that, perhaps, should be noticed. He said: "But, although we cannot consider the covenants in this case as extinguished, yet, if the consideration has failed, in whole or in part, they cannot operate to rebut the demandant's right of dower." Now, there was no question before the court as to the effect of a partial failure of consideration, and could not be; for the case stood on a demurrer to a plea which averred no performance whatever. The covenant of the plaintiff contained a stipulation that it should be pleadable in bar of her dower; and so the defendants went upon the ground that, although the annuity might be wholly unpaid, and there might be nothing to pay it with, yet she was barred. It is therefore manifest, that what the Judge said about a part failure of consideration was a mere *obiter dictum.* But it is unnecessary for me to dissent from it, for the covenant of the husband that formed the consideration for the wife's covenant, was the *whole* consideration of the latter; and the case, therefore, does not come within the principle I am discussing. It is to be observed, however, that further along in the opinion, the Judge seems to require something more than a failure of payment, and to be in doubt as to the effect of a failure of consideration, for he says: "If the annuity has not been paid, *and the security has failed*, the demandant's covenants cannot be set up to rebut her claim of dower; because there is a saving clause in the

indenture, by which she excepts her right to the annuity from the effect and operations of her covenants, which was probably intended to operate as a charge upon the real estate in the event of such failure. But if there had been no such exception, yet, if the consideration has failed, her covenants cannot operate as an estoppel or rebutter; for either they do not bind at all, *or, at most, she would be liable only, in an action of covenant, for the difference between the value of the dower and the annuity.* Confining ourselves to the present plea, we cannot determine how these facts are. The tenants have not averred performance of the covenants of their ancestor on their part; and, according to the rules of pleading, such an averment would have been improper in a plea of estoppel. In their other plea, the tenants will have the benefit of investigating these facts, if they should operate in their favor; *as to which we cannot now form an opinion.* But the second plea [that demurred to] is clearly insufficient."

So, after all, the whole opinion ends in this, that the bare covenant of the woman, with no performance whatever, past, present or prospective, (for that had to be assumed, in order to raise the question, whether the covenant, *per se*, was a bar,) could not be set up by way of rebutter *at law;* but whether, even in that case, if she should recover dower, the tenants would not be entitled to recover back any excess of value it might have above the value of the annuity, *the court did not know.*

If there could be such a cross recovery, where there was a *total* failue of consideration, I need not ask what would be the present plaintiff's situation could she recover; nor whether a court of *equity* would promote circuity of action by letting her recover, and then compelling her to pay the difference back, so as to give her, at the end of two suits, just what the will gave her before the commencement of either. In other words, if, in a case where the husband has *wholly* failed to perform, and *no compensation is tendered*, the widow is not beneficially remitted to dower and distribution, but must ultimately receive the value of the antenuptial provision, and no more, it is too manifest for argument, that, in a case like the present, she has no title, whatever, to any greater relief.

Vance v. *Vance* is disposed of by the fact, that there was no question about performance in it. The husband performed fully. The court say expressly: "In this case, there is no failure of consideration." The case was *at law*, and that created the whole difficulty. It is all in these words of the court: "The covenants cannot, therefore, *at law*, be pleaded as a release." A clearer case of a bar in equity cannot well be imagined. It is deserving of notice, however, that the court refer, with apparent approbation, to the suggestion in *Gibson* v. *Gibson*, that if the widow recover she may be compelled to pay back; thus reducing her at last, in effect, to the value of the ante-nuptial provision.

The passage cited by counsel from Greenleaf's Cruise, is merely a statement of what he understood to be decided by these Massachusetts and Maine cases, and has no application beyond them. He refers to them as his authority; and, of course, what he says was not intended to, and could not if it were intended, go beyond them. It, therefore, relates simply to cases *at law*, and of the *character* of those named.

Johnson v *Johnson's Adm.*, 23 Missouri Rep. 561, was a case of unmitigated *fraud* and *total* failure of performance; a case in which the marriage articles were concocted by the husband, (as may fairly be inferred,) as they certainly were used by him for no other purpose than to protect his own estate from any claims of his wife, while he plundered her estate to enrich himself and his relations. By the articles, it was agreed that "their separate property should, during their joint lives, form a fund, from the income of which they and their issue, if any, should be supported and maintained;" and that "for the purpose of producing such income, said Johnson should have the management of said separate property of the plaintiff;" but the proceeds of the property, with the unexhausted income arising therefrom, should ultimately be hers. Her own property, therefore, was not settled upon her *in specie*, by the creation of an executed trust, so as to deprive her husband, without her concurrence, of any power to incumber or dispose of it; but it was made the subject of a mere executory trust, of which he was to be the trustee, with a power of disposition and a liability to account; the faithful execution of

which by him would constitute the *sole* pecuniary consideration for her relinquishment of dower and distribution. And so it was considered by the court, as your Honor will see by the quotation made by our opponents, and yet more clearly by looking at the case. And, now, how did he administer this fund, and keep and perform the obligations into which he had entered? Why, may it please your Honor, he neither kept or performed a single covenant he had made; and, from the outset to the end, his only administration of the fund was for purposes of spoliation.

The suit was for dower, and the petition directly charged that "The said Johnson did never keep or perform the said marriage articles on his part, but violated and broke the same *in every part and parcel thereof*, and did conduct himself in *fraud and bad faith* towards her in that behalf, as follows: *Said Johnson did merely use and employ the said articles of agreement for the purpose of getting into his possession the property of the plaintiff, and did afterwards refuse, fail and neglect to comply with the said articles of agreement in every thing mentioned therein for the benefit of the plaintiff.*" Then followed specific and circumstantial charges of fraud, default and breach of trust, by which she was deprived, during the coverture, of a proper support; her ample property converted, in a great measure, to her husband's use and that of his relatives; and she finally left, at the age of sixty, "not only without any means of living, but without any resource save to apply to the court for her rights." All these charges, and more, being admitted by the defendants — the petition being demurred to and not answered — well might the court deny "that this unfulfilled agreement, *under the circumstances stated in the petition*, constitutes, *of itself*, without anything further, a bar of the wife's dower in favor of mere volunteers." An agreement creating no *executed trust*, but resting wholly in covenant; that provided nothing for the wife out of the husband's estate, and failed to protect her in the enjoyment of her own; that had not been executed in whole or in part, but had simply been employed to rob her of what she had; that left her at sixty without means of support, though she owned at her marriage an ample estate! — to suppose such a case as that analo-

gous to the present; or, to use language applied to it, to its very opposite, is to ignore all distinction between right and wrong, and confound beneficial performance with no performance at all.

It is admitted by the learned counsel, that if this is a case of an "executed equitable jointure," the case of *Power* v. *Sheil*, (1 Molloy, 296; 12 Eng. Chy., 147,) is a direct authority in our favor; but they say that that is "a ragged case," "an Irish blunder," has been overruled, and is not analogous. I concede that this ragged Irishman—to use the nomenclature of counsel—contains some very bad law, which was contemptuously spoken of and overruled in *Dyke* v. *Rendall*, (13 Eng. Chy., 404;) but it happens, unfortunately for my learned friends, that this scorned and overruled law makes in their favor, and that what was not scorned and overruled makes in ours. It had been settled in England, by repeated decisions, that an adult woman might bar herself of dower by her agreement, before marriage, to accept any provision, however small or precarious; and that a court of equity would enforce the agreement on the footing of *contract*, independent of analogy to statutory jointure. But, in *Power* v. *Shiel*, Sir Anthony Hart dissented from this doctrine, and, in his sympathy for the sex, required "a solid provision for the widow," (thus transcending the requirements of the Jointure Act itself, which only demands that the jointure shall not be illusory;) and, in defiance of authority and *obiter loquens*, he also said: "I put the case of a contract agreed to by an adult female before marriage, to the effect that the wife never will claim dower, and I asked what a court of equity would do with such a contract as that? Undoubtedly it would say that it only enforces contracts which may be legally entered into, but are deficient in legal form. Now, such a contract as that, the law does not tolerate in any shape."

It was this dictum of Sir Anthony — which, if it were law, would be conclusive for the plaintiff — that was treated by the Chancellor, in *Dyke* v. *Rendall*, "with something short of respect," to use my learned friends' language. He said: "I have looked at Sir A. Hart's decision in *Power* v. *Sheil*. I have myself no doubt that an adult lady may bar herself of her dower on

any terms, or make any condition she pleases. I cannot say that I understand the observation of Sir A. Hart in that case, p. 311. (Here he quoted the language of Sir Anthony, which I have just quoted, and then proceeded as follows:) "I do not understand that, for I think she may do a very wise thing by enabling her husband to deal with his estates. I have no doubt of such a right, where the female is an adult."

Now the above *dictum* of Sir Anthony is all that *Dyke* v. *Rendall* professes to overrule; and hence the statement of the syllabus is: "*Dictum* of Sir A. Hart, in *Power* v. *Sheil*, 1 Mol., 311, overruled."

But I admit that the English Chancellor would not have rendered the decree that was rendered by his Irish brother—*Dyke* v. *Rendall* plainly shows that—but then it remains to inquire what decree he would have rendered. If he would have given Mrs. Sheil *full dower*, instead of the amount of the ante-nuptial provision, given her by Sir A. Hart, then *Power* v. *Sheil* is overruled *to our disadvantage;* but if he would have given her *nothing*, neither dower or compensation, then the overruling *is in our favor;* and is stronger doctrine by far than we are in need of. Now, this latter is precisely what he would have done, for it is just what he did do in *Dyke* v. *Rendall;* which case was this: T. W. Dyke and Elizabeth Skinner, adults, intending marriage, articles were entered into, containing, first, a recital of intention to provide "a competent jointure and provision" for her, should she survive her husband, and for the issue of the marriage; next, certain covenants of the fathers of the parties, not material to be noticed, as they were not for her benefit, but for that of the husband and issue; lastly, a covenant of T. W. Dyke to give a bond to certain trustees, in the penal sum of £4,000, conditioned for the payment of £2,000, with interest at 5 per cent. per annum, within six months after the marriage, to be held upon trust for him for life; and after his death, "upon trust to pay and apply the interest and profits of the said sum of £2,000 unto the said Elizabeth Skinner" for her life; and thereafter upon trust for the issue of the marriage. He accordingly gave the bond, but all he ever paid on it was £484 18s.; and after his death his widow claimed dow-

er. On the hearing of the case before the Vice Chancellor, Sir J. L. Knight Bruce, "his Honor declared that the plaintiff was entitled in respect of her dower to one third of the rents and profits of the Bulford estate, *not exceeding for such one third of the said rents and profits* £60 12*s. per annum, being the interest at* 4 *per cent. per annum, which would have accrued due to her on the sum of* £1,515 2*s., the portion of the bond remaining unpaid.*" But, on appeal, the Lord Chancellor held that she was entitled to neither dower, or a lien for the interest, and therefore dismissed her bill; but, inasmuch as *Power* v. *Sheil* might have misled her into the belief that she was so entitled, he dismissed it without costs.

Now here was a case in which the *sole* provision for the widow —the *only* pecuniary consideration for which she released dower— was the interest in the £2,000; more than three fourths of which interest she was utterly deprived of, by her husband's failure to pay the money, unless she was remitted to dower or was entitled to a lien on the land; and yet she was refused either. And it will not escape observation, that neither the learned Vice Chancellor, who sympathized in her misfortune, nor Sir A. Hart, a very champion of the sex, was willing to hold that a default of performance involves a restoration to dower; but, on the contrary, they did hold that the ante-nuptial provision afforded the proper measure of relief—a doctrine in nowise censured by the Lord Chancellor, if relief could be afforded, and which he would doubtless have applied himself had he decreed in favor of the plaintiff. My learned friends are therefore mistaken when they say, that he "overruled the point in *Power* v. *Sheil*, and laid down the rule in chancery as directly opposed to it," if, by this, they mean that he upheld their doctrine of restoration to dower in opposition to the doctrine of compensation. He overruled the point, it is true, but not to give dower; he laid down the rule as opposed to it, but *his* rule gives *nothing*.

But what did he mean by the remark, "Of course this has nothing to do with the performance of the covenant of the husband to *give the bond*; he must, of couse, perform it if he desires to keep the estates free from dower; he must do the act

contracted for; that depends upon the common doctrine of this court"?

That he did not mean that the *money must be paid*, is very apparent from his decision; for he refused dower notwithstanding the default of payment; and the whole scope and reasoning of his opinion went to show that payment was not necessary to the existence of the bar; besides which, his language just quoted is, not that the husband must pay, but that he must "give the bond."

What, then, did he mean? Why, nothing more than this, that an *unperformed* mere *personal and executory covenant*, that creates *no executed trust*, gives no title, legal or equitable, to any *specific* thing—as, for instance, a covenant to give a mere *money* bond—is not sufficient "to *keep* the estates free from dower." But this has nothing to do with a case where the covenant creates an *executed trust*, vesting in the covenantee a perfect equitable title to a particular thing; and where the maxim of equity can have full application, that that which ought to be done shall be deemed to be done. There is not a sentence, or a word, in the Chancellor's opinion, that applies his remark to a case like the present; nor can it be thus applied without contravening rules that he never meant to disregard. Besides, there is something of *substance*, in England, in holding that where the agreement is to give a mere money bond, the bond must be given; for it affords a security for payment that might not otherwise exist, since it has a priority of payment out of a decedent's effects, and is a lien on his realty where a simple agreement is not. (2 Williams' on Exs., 867, 1434). And the wife has need of this security, for she runs the risk of non-payment; remaining barred of her dower though no payment be made. But, here, the plaintiff ran no risk at all, and needed no assurance beyond what she had—her life estate being vested in her and under her control.

It will also be observed, that the Chancellor's remark was casual and "by the way;" and remarks of that character can seldom be regarded as cautious expositions. That it was a mere *obiter* is shown by the fact, that, in the case under consideration, the husband *had given the bond.*

It is further to be noted that each of these cases—*Power* v. *Sheil* and *Dyke* v. *Rendall*—go beyond what we require; for in each of them, the promised annuity, or income, was the *sole* provision for the wife; and the covenant of the husband, therefore, the only pecuniary consideration for the release of dower; from which it results, that had dower been decreed in those cases, the rule of *Boone* v. *Eyre* would not have been infringed, nor the present case affected. We would still stand on the ground that our covenant to devise went to but a *part* of the consideration. But dower was not decreed, and the cases are, therefore, *a fortiori* authorities for us.

Bliss v. *Sheldon*, 7 Barb., 154, 4 Seld., 37, is the only case remaining, of those cited by plaintiff's counsel, on the question of performance. It has been well disposed of by my brethren, Hunter & Daugherty, (Argument, 69–70;) but as so much reliance is placed on it, I will be pardoned, I trust, for noticing it further. In the first place, I admit that the case was correctly decided; but, in the second place, I affirm, that in no one essential feature is it analogous to this case; and that it is a mere misuse of precedent to apply a judge's language in respect to a case like that, to a case as wholly different and dissimilar as is the present case. It is impossible for a judge, without writing a treatise on the law instead of a mere decision of a case, to so hedge about his language that it shall not be capable of misapplication; and, hence, the fundamental rule, in all intelligent courts, that the language of the judge is limited to the *facts of the case*, unless a contrary intent is manifestly apparent. And even where there is such an intent, and the purpose of the judge to make a broader application of what he says is quite undeniable, just in so far as he makes that broader application, just that far does his opinion lose the force of authority and become a mere dictum. There is no reason, however, why we should suppose that the judges who decided *Bliss* v. *Sheldon*, intended any such thing; and, therefore, upon the well settled principles that govern the consideration of precedents, the language they used is to be limited to that case.

And now, may it please your Honor, let us mark the difference in the cases.

(1) The first thing to be observed is, that the Court inferred, from the agreement, that performance by the husband was *intended by the parties* to be a condition precedent; and they, therefore, so construed it. This construction was given—not by holding that a husband's performance is *always* such a condition, for that would have been absurdly erroneous—but by a consideration of the terms of the *particular* instrument. The husband's covenants were *wholly executory*, and no benefit was to, or could, accrue from them *during the coverture*. Even the wife's furniture that she brought, was to become his property, for it was one of the things that he covenanted to bequeath. The real estate to be devised was not so designated as to create an *executed trust;* and, consequently, the wife would not be seized of an equitable estate. No *particular* rooms or garden spot were embraced by the covenant; but, on the contrary, a devise of *any* square room and bed room adjoining, in the south part of the house, and of *any* garden spot wherever situate on the premises, would be performance. The annuity to be paid, was to begin with his death, and this, together with the above mentioned matters, formed the whole pecuniary consideration of her release. And so, there could be no part performance during the coverture, and the man would go to his grave as rich, and the widow remain as poor, as though no contract had ever been made. Well might the Court presume, in view of such an instrument, that the parties intended performance to be a condition precedent. But how different the instrument from the contract before us, and how different the results! There, justice required that performance should be a precedent condition; here, justice is endangered if the covenants are not deemed independent. There, the whole benefit of the contract to the woman depended upon performance; here, a devise of the lots would have conferred no *benefit* upon her. There, she could get nothing at all if the will were not made; here, she would get everything that was beneficial without the aid of a will. There, it would have been irrational to suppose that independent covenants were meant; here, it would be almost absurd to suppose that they were not. (See ante., p. 104, *et seq.*)

(2) In that case, the question was on setting up an unperform-

ed executory contract; in this case, it is on setting aside a beneficially executed trust.

(3) In that case, there was no performance at all, and no power to make compensation, (there being no provision in the will enabling the executors to do so;) in this case, the most valuable part of the covenants has been performed, and ample compensation for the unperformed is provided by the will.

(4) In that case, "the husband, in his lifetime, virtually repudiated" the agreement, (4 Seld. 36;) in this case, he performed, during life, what he was bound to perform, and beneficially executed when dying what he was then bound to do.

The only authority referred to by the Supreme Court of New York, was Clancy, 103; and what a blunder that was, has been pointed out by my associates; the only citation of the Court of Appeals was Greenleaf's Cruise, already noticed, and how far that is from supporting the now plaintiff, I trust I have sufficiently shown.

I have thus, may it please your Honor, reviewed all the authorities on the question of performance produced by my learned adversaries, and, I humbly submit, that not one of them supports, or tends to support, their case; and that, on the contrary, some of them are quite decisive against it.

3. I will now ask attention to a few more authorities on our side, which show that equity goes farther than the law in enforcing the performance of contracts, and especially marriage agreements; and will, even in the case of dependent covenants, decree in favor of a defaulting party, if it is *conscientious* to do so; and where, owing to a change of circumstances, a strict performance is impossible, will decree performance *cy pres*, or direct compensation to be made.

In *Davis* v. *Hone*, 2 Sch. and Lef. 347, Lord Chancellor Redesdale said: "A court of equity frequently decrees specific performance, where the action at law has been lost by the very default of the party seeking the specific performance, if it be, notwithstanding, *conscientious* that the agreement should be per-

formed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and, to sustain an action at law, performance must be averred according to the very terms of the contract."

And again: "But because the plaintiffs ought not to have the covenant performed literally, they are not to lose their property entirely. This court will execute the covenant, according to a *conscientious modification of it, to do justice as far as circumstances will permit.* It has happened, by lapse of time and change of circumstances, that it would be harsh and unjust to require execution of the covenant specifically in the very terms; but it is the advantage of a court of equity that it can modify the demands of parties according to justice."

And thus says Story, 2 Com. on Eq., sec. 771: "In general, it may be stated, that to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part. If he has been guilty of gross laches, or if he applies for relief, after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross negligence of suitors. But this doctrine is to be taken, (as we shall presently see) with some qualifications. For, although courts of equity will not encourage laches, yet, if there has not been a strict legal compliance with the terms of the contract, and the non-compliance does not go to the essence of the contract, relief will be granted."

And again, sec. 772: "A distinction has been put upon this subject by Lord Chief Baron Gilbert, which is entitled to consideration, because it apparently reconciles authorities, which might otherwise seem discordant. It is the distinction between cases in which the plaintiff is *in statu quo* as to all that part of his agreement which he has performed, and those cases in which he is not *in statu quo.* In the former cases, equity will not enforce the agreement, if the plaintiff cannot completely perform the whole of his part of it; *in the latter cases, equity will enforce it, notwithstanding he is incapaple of performing the remainder by a subsequent accident.*"

And again, sec. 775: "Where the terms of an agreement have not been strictly complied with, *or are incapable of being strictly complied with;* still, if there has not been gross negligence in the party, *and it is conscientious that the agreement should be performed; and if compensation may be made for any injury occasioned by the non-compliance with the strict terms;* in *all such cases*, courts of equity will interfere, and decree a specific performance. For the doctrine of courts of equity is, *not forfeiture, but compensation;* and nothing but such a decree will, in such cases, do entire justice between the parties. Indeed, in some cases, courts of equity will decree a specific execution, *not according to the letter of the contract, if that will be unconscientious, but they will modify it according to the change of circumstances.*"

In *Harvey* v. *Ashley*, 8 Atk. 610, Lord Hardwicke said: "There is a difference between agreements on marriage being carried into execution, and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law: in *marriage agreements it is otherwise; for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance.*"

So in *Bowie's Exrs.*, v. *Bowie*, 1 Md. Rep. 100, it was ruled: "A failure to comply by one party to a marriage contract, *does not release the other after the marriage has been consummated.* Such a contract is not similar to those of an ordinary character. Rights are secured to the husband and wife, and to the issue of the marriage, which entitle them to compel a compliance by either party."

In the matter of *Heald's Petition*, 2 Foster (N. H.), 265, the case was, that, by an ante-nuptial contract, the intended husband agreed to relinquish all claim to the property of the intended wife, and she agreed to relinquish all claim to his. In speaking of what would have been the effect of a breach of his covenant by a misuse of his *legal* rights, and what would be proper in such a case, the court said: "There seems to be no reason

why he might not, after the marriage, in the exercise of his marital rights, reduce her personal property to his possession, and appropriate it to other purposes than those for which it was intended by the agreement it should be used. If he might do this, his wife would have no remedy during the existence of the marriage. But in such case, it would seem proper and equitable that she should be *compensated* out of his estate for the property which, by the agreement, was to be kept separate therefrom."

And in *Gould* v. *Womack*, the Alabama case so prominently cited by plaintiff's counsel, the court said: "In those countries where the widow is authorized to bar her dower at law by an ante-nuptial contract, courts of chancery, which look at the substance of things, and disregard form, will decree a specific performance, in cases where the provision is inadequate, *if it does not* ENTIRELY *fail*, because such was the intention of the parties."

Counsel put an extreme, *impossible* and non-analogous case, on page 16 of their argument, beginning as follows: "Suppose Mr. Hunter to have bought his house and grounds of a married man, and taken a deed, in which the wife did not join; and afterwards Mr. Ewing takes a deed of the husband and wife for the same property; *E. then has a contingent estate of dower in the premises.*"

With submission be it said, E. has no such thing, nor anything else in the premises. Dower, before assignment, is, for most purposes, a mere right of action; and though it is, in fact, an interest in the land, yet it is not an *estate*, and is not transferable. It may be *extinguished*, but it cannot be conveyed; in which respect it differs from every other interest in land. (*Park on Dower, chap.* 16.) Jointure is transferable, (*Cruise's Dig.*, 211; 1 *Bright*, 464,) but dower is not. When a woman, entitled to dower, joins with her husband in a conveyance, her right is not transferred; it is *extinguished*. "But a title to dower is, for most purposes, nothing more than a right of action; and, consequently, transferable in no other mode than by release to the *terre-tenant* by way of *extinguishment*," &c., says Park, *ibid.* And so say our Supreme Court: "It is not in the power of the widow to

transfer any interest in it, until it has been actually assigned. When the dower is assigned, when it is aparted and set off to her, by metes and bounds, then she may sell and convey—not before. The right, the chose in action, if I may so speak, is not assignable. It may be relinquished to him who has the next estate of inheritance in the land out of which it is to be carved, but cannot be transferred to a third person."

So, in the case supposed, the title to dower might be relinquished to Hunter, but not transferred to Ewing.

Besides, the supposed case is not analogous, for there is nothing in it to rebut a presumption of a mutual abandonment of the contract; but in this case, the parties expressly declare in their post-nuptial agreement, that their ante-nuptial contract, except in the matter of the devise, shall "*remain firm.*" And whether the post-nuptial contract is valid or not valid, this declaration shows that the ante-nuptial contract, by which the plaintiff is barred, was not meant to be abandoned.

I might further criticise the hypothetical case of counsel, but it can hardly be necessary to do so.

4. The plaintiff is not, under the circumstances, at liberty to set up the failure to devise the lots, in order to get rid of her covenants; for if she could get rid of them, in that way, she would perpetrate a fraud that a court of equity will not tolerate.

It is unnecessary for me to repeat here the facts of the case—it is sufficient to say, that the failure to devise resulted from the conveyance to Marfield and his associates; that that conveyance never would have been made without her concurrence; that she had it in her power to prevent it, or, at least, to prevent an alienation of her own interest; that she certainly promoted, if she did not suggest, the sale of the property; that she took active measures, by remonstrance and advice, (*vide*, testimony of Gordon, Wills, et als.,) to counteract any opposition to the sale; that she agreed to accept an equivalent for her interest, and suffered her husband to live and die in the belief that she was satisfied; and, finally, that the equivalent thus agreed upon, is bequeathed to her by the will and ready to be paid.

Now, under these circumstances, I maintain, that, whether the

post-nuptial agreement is valid or not, the plaintiff is estopped, in equity, to say that her husband's covenant is broken. I dissent from the proposition of her counsel, that fraud cannot be imputed to a feme covert; but were that so, the question here is, not whether a married woman can be made liable for her fraud, but whether a woman *discovert* shall be allowed, *through the agency of a court of equity*, to *perpetrate* a fraud. It is not necessary for me to show that, in urging and concurring in the sale, she had any latent purpose to do wrong; it is sufficient that she seeks to do it *now*, and invokes the aid of a *chancellor* to enable her to do it. She may say, if she please, "I was honest in all that I did"—the language of the law is, "*You must be honest still.*"

But there is no foundation for the idea that a married woman is not accountable for fraud, or that it cannot be imputed to her. Why, suppose she acquire an estate through fraudulent means, will she not be made to release it? Suppose she convey her own estate to defraud her creditors, will not the conveyance be void? Suppose she obtain money or goods by false pretences, will not she, as well as her husband, be liable to an action? Suppose she stand silently by while her property is sold as the property of another, can she afterwards reclaim it from an innocent purchaser? Suppose she procure the execution of a will through undue influence or fraud, will it not be set aside? Suppose she take the life of her husband to prevent his making a will, will she be absolved from her contract for want of a devise? Suppose she induce him, by fraud, to omit a devise in the will he does make, will she acquire any greater rights by reason of the omission? Suppose she destroy his will, and it cannot be proved, can she found any claim on the absence of a will?

What say the books?

"A married woman is liable for *torts* actually committed by her." (1 Chitty's Pleadings, 76, *margin*).

"*A feme covert is answerable for an act of fraud, in a court of equity, as much as if she were a feme sole.*" (*Jones* v. *Kearney*, 1 Dr. & W., 134, 167; Hill on Trustees, 145, note.)

"There is also an implied as well as an express assent; as

where a man who has a title, and knows of it, and stands by, and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him, by it. *Neither shall infancy or coverture be any excuse in such case.* And this seems a just punishment for his concealing his right, by which an innocent man is drawn in to lay out his money." Fonblanque's Eq., B. 1, Chap. III., sec. 4.

And Story, speaking on the same subject, says: "Indeed, cases of this sort are viewed with so much disfavor by courts of equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentaton; for neither infants nor *femes covert* are privileged to practice deceptions or cheats on other innocent persons." 1 Story's Com. on Eq., § 385.

McFarland v. *Febiger's Heirs*, 7 O. R., 194, is relied on by plaintiff's counsel. But it decides nothing more than that the defective deed of a married woman, will not be treated as an executory contract for the conveyance of lands, or release of dower—and this for the plain reason, that she is incapable of making such an executory contract in respect to land that is not her separate estate. Judge Lane's remark about fraud, though somewhat unguarded, is plainly limited to the case before the court. And what that case was, he states himself as follows: "The wife was passive. She was not bound to be otherwise. She assigns a sufficient reason for her passiveness, and for her action, as far as both went. In her circumstances, there is no taint of fraud in her conduct."

But here we set up no such executory contract of a married woman, for the bar to the plaintiff is not in her post-nuptial agreement, but in her ante-nuptial covenants. Besides, she was not merely passive in the sale of the property, but actively promoted it, both by advice and silencing objectors. Nor is it a case in which she acted without compensation, as in McFarland v. Febiger. But, on the contrary, she is more than compensated.

Good v. *Zercher*, (since overruled,) and *Purcell* v. *Goshorn*, decide nothing more than *McFarland* v. *Febiger*. And all these cases were in the remembrance of the Court, when they said, in

Blake v. *Davis*, 20 O. R., 244: "To get it, she must present an honest, not a technical case. She cannot, in honesty, take this land from the occupants, while her father's estate was relieved with the very money that paid for it, and when she has acquiesced in the action of the administrator for more than half a century. I know it is said that she is a married woman; but I have yet to learn that even married women have a *right to do wrong*. We take from her none of her rights—we only prevent her from taking the rights of others."

But it is not necessary that the wife should have been guilty of actual fraud. It is sufficient to bar her, that to allow her to succeed would operate a fraud.

This is well illustrated by the cases where the owners of lands stood silently by and saw them sold by others to innocent purchasers; as to which cases it is said, (*Fonblanque's Eq.*, *supra*, *American note*,) "it seems to be immaterial whether the real owner was induced to conceal his title and omit to assert it from fraudulent motives, or from other considerations which he deemed at the time prudential."

The truth of this remark is very clearly shown by the cases of *Savage* v. *Foster*, 9 Mod., 35, and *Hunsden* v. *Cheyney*, 2 Vern., 149, in which married women, seized of lands under marriage settlements, lost them by such silence, though it was not intentionally fraudulent.

And the case of *Livingston* v. *Livingston*, 2 J. C. R., 539, which was a case of a different sort, strongly illustrates the doctrine; for in that case the Court enforced performance of a contract between husband and wife, against the heirs of the latter and in favor of the former; not on the ground that the wife had acted fraudulently, but that the husband *would be defrauded* if the contract were not specifically decreed. The plaintiff's counsel say that this was a case of a resulting trust; but the Court went upon no such ground, for that would have required a decree for the title to the newly purchased lot. But the decree rendered by the Court was for the sale of the old one, which could only be done on the doctrine of specific performance and for the preven-

tion of fraud. Counsel also intimate that the Chancellor may have derived some special power to pronounce that decree from the statute of New York, to which he refers. But a reference to the statute will show that it was no part of its purpose to enforce the performance of contracts that were wanting in validity; its only object being to authorize a transfer of an infant's title where there was a valid obligation to transfer. There is not a word in the statute that warrants the idea that it was intended to apply to any bargain, contract or agreement that would not have been specifically enforced against the party who executed it; and such an idea would be nothing less than absurd—besides which, there is not a word to that effect in the opinion of the Chancellor. The statute is as follows: "The court of chancery shall have power to decree, and compel a specific performance, by any infant heir or other person, of any bargain, contract or agreement, made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract, or agreement, ought to be decreed or compelled." Laws of 1814, (N. Y.,) p. 129, § 3.

The doubt implied by the remark of the Chancellor, "I *presume* I have power to carry this *partly executed* agreement into effect, under the 3d sec.," &c., was a doubt whether there had been *such* part performance as to take the agreement, which was verbal, out of the operation of the Statute of Frauds.

VIII. I have thus far treated the case as if the post-nuptial agreement had no validity, and have demonstrated, I trust, that, even in that view of it, the plaintiff remains barred. I now propose to show that the agreement is valid; 1. Because the plaintiff's estate was her separate property, in respect to which she had the powers of a *feme sole*. 2. Because a post-nuptial contract is not necessarily void, but may be specifically enforced where justice requires it; and that is this case.

1. Was the estate her separate property? By the language of the covenant, it was "to be held and possessed by her, *for her sole use and benefit during her natural life;*" and that these words are sufficient to create a separate estate, cannot be denied. Indeed, they are the very words mentioned in the books, as most apt and proper for that purpose. (Story's Eq., sec. 1382, and cases cited.) But it is contended by her counsel that these words only express a fact that would have existed were they stricken out; for, it is said, that as she was to come into possession after the death of her husband, she would, of course, hold the estate, after she came into posesssion, free from marital right But this reasoning is unsound, and the construction inadmissible—1. Because it violates the rule requiring effect to be given to every word of the contract, if that can be done; and, 2. Because, in the event of a subsequent marriage, the plaintiff would have held the estate as her separate property, free from all marital right of her second husband; which would not be the case were the words stricken out. But if it would be her separate estate in the event of a second marriage, it was *always* such an estate; for the nature of the estate could not be one thing at one time, and another thing at another. That where property is given, or limited, to the sole use and benefit of a woman, whether married or unmarried, it is her separate property under every coverture that may happen, is now too well settled to admit of dispute. Some doubt was once thrown on this point by Lord Cottenham, when Master of the Rolls, in a dictum in *Massey* v. *Parker*, 2 M. and K. 174; but, as said by Hill in his work on Trustees, 419, "in the subsequent cases of *Tollet* v. *Armstrong*, and *Scarborough* v. *Bowman*, in which it became necessary to adjudicate on the point, Lord Langdale, M. R., decided in favor of the validity of the trust for the separate use; and in affirming those decisions on appeal, Lord Cottenham, when Chancellor, formally overruled his own *dictum* in *Massey* v. *Parker*, and finally established the doctrine as stated above."

And Bright says: (vol. 2, 205.) "A trust for the wife's separate use is effectual against the husband, although the wife may be unmarried at the time of the creation of the trust, or

being married at that period, may have become discovert, and afterwards married again. This point was decided at common law in the case of *Beoble* v. *Dodd*, and afterwards by Sir J. *Leach, V. C.*, and also by Lord Eldon in the case of *Anderson* v. *Anderson;* and it does not appear to have been doubted until some observations which fell from Lord Cottenham, then M. R., in the case of *Massey* v. *Parker*. But the validity of such trusts is now fully established by the authority of *Tollet* v. *Armstrong*."

In truth, in this case, the very terms of the contract render any other construction impossible; for not only is there a total absence of any limit of the separate use to a particular coverture, but the contract expressly declares that it is to exist "*during her natural life.*" Now, had Mr. Ross died seized of the lots, and had the plaintiff married again, no court would think of holding that her second husband had any rights in the property; or would listen to an argument that the words, "for her sole use and benefit during her natural life," were to be rejected or frittered away—her separate estate would be too manifest to admit of any controversy. But, as before said, the contract makes no discrimination between one coverture and another, and neither does the law where the parties have not discriminated; from which it inevitably results, that the estate was as much her separate property during the coverture of Mr. Ross, as it could ever be under any other coverture.

In respect to the general doctrine of the power of a married woman to dispose of her separate estate, I need only refer to the citations of my associates. And as to her power, where the estate is contingent, I submit that nothing could be more satisfactory than the observations of Messrs. Hunter & Daugherty. The cases of *Richards* v. *Chambers*, and *Seaman* v. *Duill*, 10 Ves. 580, and *Lee* v. *Muggeridge*, 1 Ves. and B. 117, do not touch this case. The first two cases related wholly to *personalty;* and, in the latter case, the wife had no estate in the land, but only a right to *rents and profits*. The land itself was limited to trustees, to pay the rents and profits merely to her separate use; and upon the distinction between that and a limitation to her of

the land itself, the counsel for her estate, Sir Samuel Romilly and others, grounded their argument; which they opened by saying: "If the plaintiff can establish that Mrs. Muggeridge had separate property, then, under the authority of *Peacock* v. *Monk*, *Hulme* v. *Tenant*, and other cases of that class, he must recover; but the *rents and interest only* are settled to her separate use, for the joint lives of her and her husband; not the capital of her estate, which is left subject only to her appointment by will; of which, therefore, she could make no disposition by deed in her husband's life. The case of *Heatley* v. *Thomas*, has no application; the whole property was vested solely in the married woman; who could, therefore, immediately after the execution of the settlement, have disposed of it by deed; no such power existing in this case."

And the Master of the Rolls began his decision by noting the same distinction, as follows: "Whether the case of *Heatley* v. *Thomas* be well or ill decided, it has no bearing upon the present. There was a declaration of trust, as to the whole fund, for the sole and separate use of the wife; not, as in this case, as to the *interest only*."

It is thus manifest that these cases all stand on the same principle; and so it was declared by the court in *Lee* v. *Muggeridge*; and now what is that principle, if carried to the fullest extent that can be deduced from the cases? It is simply this, that where the property is such, *that the law provides no mode for its disposition by a married woman*, to wit: personalty, and her title thereto is merely *contingent*, she has no power of alienation until the contingency occur. And hence, if that contingency be the death of her husband, she has no power of alienation while the coverture lasts. In such a case it will be presumed that it was the intention of the parties to place the property beyond the power of the wife during the continuance of the coverture, there being no means by which she can dispose of it without the aid of a court of equity. But the principle has, obviously, no application, where the thing settled on the wife is *real estate*, which, by express provision of the statute, she has power to convey by statutory deed, so as effectually to bar herself of any and

every claim to it. In the latter case, it cannot be presumed that it was the intention of the parties to put the property beyond the power of the wife; for they could not but know, when making the settlement, that she might effectually part with it by a deed of husband and wife, which, if it did not transfer, would at least have the effect to extinguish her estate, or to create an estoppel against her. And this distinction is fully recognized in the above mentioned cases, for the Master of the Rolls, (10 Ves. 587,) very clearly admits, that had the thing been realty, it might have been aliened by a fine. And what possible doubt can there be about it, since a fine with warranty, or our statutory deed with such a covenant, effectually estops her from ever afterwards setting up title to the land.

But again: suppose the estate in this case had been to take effect in possession as soon as the marriage was solemnized, there would not be a doubt as to the plaintiff's power of disposition; she would clearly have the same power over it in equity, as though she were a *feme sole;* and yet, even in that case, she could not pass a legal title without the concurrence of her husband in a statutory deed. In that case, the necessity of his concurrence would raise no manner of presumption that it was the intention of the parties to place the property beyond her power of disposition, and neither will it in this.

But, in truth, it matters not whether the estate was alienable or not, so as to continue in the purchaser as a subsisting estate. Separate property may be alienable or inalienable, according to circumstances. But if the right to it may be extinguished according to law, a contract for its extinguishment is as good as one for its alienation, where it is unquestionably alienable. This is well illustrated in principle by the analogous case of dower, in which it has uniformly been held, that if the husband agree with the wife to pay for her relinquishment of dower, and she execute a deed that effectually relinquishes it, the contract to pay is obligatory. *Garlick* v. *Strong*, 3 Paige, C. R., 440; *Bullard* v. *Briggs*, 7 Pick., 533.

But the case of *Scot* v. *Bell*, 2 Levinz, 70, (cited with appro-

bation in *Bullard* v *Briggs*,) is more directly in point. There, Sir Robert Bell, on his marriage with Mary Cheek, settled on her certain lands in jointure. Some time after the marriage, in consideration that she would join in a fine of the jointured lands, he agreed to settle upon her other lands. She joined in the fine, and he made the new settlement. Held by the Court, that the new settlement was valid and should be maintained.

As to what is said by the learned counsel about the statute of frauds, it amounts, I respectfully submit, simply to this—that if your Honor verbally agree to sell me your farm for $10,000, which I verbally agree to pay, and, pursuant to the agreement, you convey the farm to me, or to my appointee, the agreement is void by the statute of frauds, and you can't recover the money. The plaintiff agreed to join in the conveyance to Marfield for $10,000, and she did so. She has thereby irrecoverably lost the land, and, according to her counsel, the contract for the money is void. I beg leave to suggest, however, that it is only the *conveyance* that need be in writing. I may plead the statute of frauds before I receive or make a conveyance, but not afterwards.

2 But independent of the doctrine of separate property, a post-nuptial contract is not necessarily void; but may be specifically enforced where justice requires it.

Contracts between husband and wife are void *at law*, upon the theory that they have no separate identity; but, in equity, their separate existence is recognized, and their contracts are, at most, but *voidable;* and not always that. For if the contract is reasonable, and has been relied and acted upon, so that not to enforce it would operate a fraud, it will be enforced. In such a case, the wife, or widow, is not permitted to elect; but will be bound by the contract which, *in foro conscientiæ*, she ought to abide by. The case of *Livingston* v. *Livingston* is clear to this point; and if that case has ever been dissented from, the dissent remains undiscovered. Certain it is, it has the sanction of great names; for it was decided by Kent and fully approved by Story, who, in his Commentaries on Equity, treats it as unquestionable law,

and places it on precisely the true ground. He says (Sec. 1372): "But here again, although courts of equity follow the law, they will, *under particular circumstances, give full effect and validity to post-nuptial contracts.*" Then follow illustrations, among which is the following, which he supports by a reference to *Livingston* v. *Livingston* and other authority: "So, if the husband and wife, for a bona fide and valuable consideration, should agree, that he should purchase land, and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate; if he should perform the contract on his side, *she also would be compelled to perform it on her side.*"

Here Mr. Ross did perform. He executed the ante-nuptial contract so far as it remained unmodified, and he executed the modification by devising the $10,000. By virtue of his performance, the plaintiff has been greatly benefited, and to put the parties *in statu quo* is manifestly impossible. Could there be a clearer case for holding her bound?

And observe how much further the authorities go than is necessary for our support. In *Livingston* v. *Livingston*, the agreement was *wholly post-nuptial*—in this case, it is the plaintiff's *ante-nuptial* covenants that bind and bar her. In that case, the question was on *setting up* the agreement—in this case, it is on *setting it aside*. In that case, a *conveyance* was necessary on the part of the woman's heirs—in this case, the plaintiff is barred without a further release.

Counsel say that a *wife* cannot part with her expectancy in an estate, and they cite *Needles* v. *Needles*. The case don't so decide; but if it did, it would have no application; for, as above said, it is by the ante-nuptial contract that the plaintiff is barred. She had no expectancy in the personal estate to sell, when the post-nuptial contract was made; for the effect of the ante-nuptial contract was to prevent any right of hers from ever attaching to that estate—as has been shown already, and will be further shown hereafter.

IX. But suppose the plaintiff has an election, the question remains, what is it? Is it a right to elect between dower and distribution on the one side, and the $10,000 on the other; or, between the

$10,000 and the value of the unperformed ante-nuptial provision? I unhesitatingly affirm that, both on principle and authority, it must be the latter; and I challenge the production of a case that tends to prove it is the former. I don't ask for a case "on all fours," for that may not be in the books. I only ask for a case that *in principle* supports the plaintiff's claim. Cases enough may be found in which it is held that a woman is not bound to take a post-nuptial settlement, but may elect to avoid it and claim dower and distribution—for that is common doctrine—but they are all cases in which there was no ante-nuptial contract. Or, if there is any such case, in which there was an ante-nuptial contract, such contract had been abandoned, expressly or in fact. But here, it is idle to talk of an abandonment; for the parties both declared, in their post-nuptial agreement, that the ante-nuptial agreement was not thereby set aside; and they both treated it as existing until the death of Mr. Ross. For more than five years that he lived, after the conveyance to Marfield, she continued to hold and enjoy the whole of her personalty, by virtue of the ante-nuptial contract; and by virtue of that contract she still holds and enjoys it. On the other hand, he never thought of claiming her property, and by his last will and testament he executed the contract, as modified, by devising her the $10,000. And the Answer expressly avers that it was so treated by the parties so long as he lived; an averment that is in nowise controverted by anything in the Reply. To talk of abandonment, under circumstances like these, would be simply ridiculous; with respect be it spoken.

Now, may it please your Honor, on what principle does election rest in the case of a voidable contract? Does it go upon the ground of giving the electing party *more* than he or she could have claimed *had no such contract been made?* That would be a strange kind of an election—an election between the provisions of the contract and rights that *never had an existence!* Here, the plaintiff never had a right to dower and distribution, for the ante-nuptial contract took the place of that right; and yet it is pretended that by electing to avoid the post-nuptial agreement, she acquires that to which she never had the least title. It is not

sufficient, in the opinion of her counsel, that she shall be restored to the rights of which the post-nuptial contract would deprive her; but your Honor must go further, and because she may avoid the post-nuptial agreement, (assuming that to be so,) *permit her to avoid the ante-nuptial also.* In other words, you are asked to hold, that because a *married* woman is incapable of making a binding contract, the contract of a *single* woman *ought to be set aside.* Had the ante-nuptial contract been abandoned by the parties, the case would be wholly different; but, not having been abandoned, you are asked to disregard it because a *subsequent* contract may not be obligatory.

But, may it please your Honor, the law is not so absurd; and the principle of election is too clear for dispute. It is nothing more than this, that the electing party has a right to insist upon the contract, or to set it aside and be placed, literally or beneficially, *in statu quo.* If he can be literally restored to what the contract would displace, he must be so restored; but if that cannot be done, he must be restored *beneficially*—that is, compensation must be made. Thus, if an infant sell his goods, he will have a right, when adult, to insist upon the contract and demand payment of the price; or, electing to disaffirm it, he may recover back his goods, or their value if they be lost. So, if a man obtain, by fraud, a conveyance of my land, I may stand by the conveyance and enforce payment of the purchase money; or, I may have it set aside and recover back my land. But if he shall have conveyed it to an innocent purchaser, so that he cannot restore it, I must abide by my conveyance or accept compensation. So, here, if the plaintiff has an election, it is a right to determine whether she will take the $10,000, or demand, as compensation, the value of her lost life estate in the lots. If she make that demand, we are ready to meet it—it falls short of the $10,000; but if it be more, we are yet ready to pay, if she is entitled to make the demand.

Let us suppose, by way of further illustration, that Mr. Ross had repurchased the property, and died seized of it, and that the plaintiff has a right to avoid the post-nuptial contract; would there be any doubt, that if she elected to avoid it, she would be

compelled to accept a life estate in the lots? Or, suppose that the property had not been sold, and that Ross and his wife had agreed that, instead of the life estate, he should bequeath her $10,000, and he had made the bequest and died owning the property; would not her election be the same? But if this would be so—and it is too clear to be questioned—upon what principle can she claim to have dower and distribution? Not on the ground that the life estate was not devised, for there is no such devise in the cases above supposed; not on the ground that the contract was abandoned, for the idea of abandonment is too flimsy a pretense; not on the ground that a life estate cannot be valued, for such estates are appraised, every day, when sold on execution; not on the ground that compensation cannot be made, for the money is here, ready for her acceptance. There is nothing then upon which to found such a claim.

We have seen that even where the husband, without any excuse, failed to perform, Sir Anthony Hart and Vice Chancellor Bruce gave to the widow only the value of her jointure; that the Supreme Courts of Massachusetts and Maine have intimated that such may be the ultimate result of even a litigation at law; and that no case has been produced that conflicts with these authorities. But, if in a case where there is no post-nuptial agreement to excuse non-performance, the widow is not remitted to dower and distribution, but must take the value of the ante-nuptial provision, with what face can it be pretended that where performance is thus excused, she can get more than that provision, by electing to avoid the post-nuptial contract; and that too in a case where the ante-nuptial contract has not been abandoned?

Nor will your Honor fail to observe the principle of our jointure act, that where the widow is evicted from her jointure, she is not remitted to dower, but gets an equivalent for what she has lost. If this is the rule where she is in no wise accessory to the loss, with how much more reason is it the rule where she makes her claim by electing to avoid her contract.

X. It was said at bar, by one of the plaintiff's counsel, that

the defendants are mere volunteers, who, therefore, have no right to enforce performance; the articles remaining, according to the same argument, executory. This point seems to be abandoned, as there is nothing of it in the printed argument of counsel; for which reason, and also because it has been discussed, in a masterly manner, by my associates, Messrs. Hunter & Daugherty, I ought, perhaps, to pass it by without remark. But as I have a desire, pardonable I hope, to make thorough work in this case, I will, with as much brevity as possible, say something upon it.

The theory of the point is, that collateral relations, even brothers and sisters, are mere volunteers; and hence it was argued, they can derive no benefit from a contract like this. The first thing that strikes one, in looking at the objection, is, that if it be sound, perhaps nine out of ten of marriage agreements with us will be utterly defeated, if there be a failure of issue. Or, rather, which is worse, they will be observed by the parties during their joint lives, and become mere instruments of fraud as soon as either of them die. To illustrate by this case, it cannot be denied that it was the *purpose* of the parties that Mr. Ross should have power to dispose of his estate, in the event of his death, to whomsoever he pleased; saving the plaintiff's right to a life estate in the lots. The purpose is distinctly declared in the preamble to the contract, as well as necessarily to be inferred from the circumstances of the case; and the contract is precisely the same in its legal effect, as though a power of appointment by will were, in terms, contained in it. On the faith of this contract, the marriage took place; and Mr. Ross faithfully observed it as long as he lived; the consequence of which is, that the plaintiff holds her own estate with the whole of its increase, in addition to ten years' support that she received out of his. Now, if she can defeat the very purpose of the contract, by taking his estate too, upon the theory that the objects of his bounty are mere volunteers; that those for whose benefit it was made, have no power to enforce it; it is manifest the instrument becomes a mere engine of fraud. And the case would be the same, had her ante-nuptial provision been ten-fold what it was; for this volunteer doctrine don't depend on the *quantum* of consideration.

But there is nothing in the point, and this for several reasons:

1. The doctrine only applies where a covenant *to settle* is sought to be enforced. But the covenant of the plaintiff, upon which we rely, is not of that character, as was expressly said by the court in *Hardy* v. *Van Harlingen*. She covenants to *settle* nothing on Ross or his appointees, but merely to suffer *him* to dispose of *his own* estate according to his will. Had she covenanted to settle *her* property on him and *his devisees*, and were the defendants here claiming *it* under his will, and asking your Honor to compel her *to convey*, the question would arise whether they are mere volunteers; but as it is, there is no such question in the case. The books will be ransacked in vain, I think I may safely venture to say, to find any case that holds that there is such a question here.

In *Hardy* v. *Van Harlingen*, the husband covenanted that the wife should have her own estate, and that, at her death, it should pass to her legal distributees and heirs; here, the wife covenants that the husband shall have his estate, and that, at his death, it shall pass to his devisees and legatees; the cases, in principle, are identical. Mrs. Van Harlingen died without issue, and her brothers and sisters claimed the property, by virtue of the ante-nuptial contract, and filed a bill to recover it—her late husband claiming part of it under post-nuptial gifts, and the residue being in the hands of an executor. It is, therefore, quite apparent, that if the brothers and sisters of Mr. Ross are mere volunteers, entitled to no relief, the brothers and sisters of Mrs. Van Harlingen were in precisely the same category. Or, to speak more correctly, they were in a still worse condition, for they were not brought into court as defendants, but they brought the suit themselves, and asked the aid of the chancellor. It was, therefore, an *a fortiori* case for the application of the doctrine, if it had any application. But what said the court? Why, as to the property that was covered by the post-nuptial gifts, they sustained the title of the husband, *because the gifts were valid;* but the residue of the property they gave to the complainants, upon the express ground that they were entitled to it by the ante-nuptial agreement. They said: "As to the resi-

due of the legacy, still in the hands of the executor, and of which no disposition was made by Mrs. Van Harlingen, *the terms of the ante-nuptial agreement will pass it to the complainants.*" The case, therefore, is a direct authority that brothers and sisters are entitled to enforce such a contract; and if enforced at all, it is so for the benefit of all, whether volunteers or not. (Story's Eq., § 986.) This is the well settled doctrine, and is properly admitted by plaintiff's counsel, on page 7 of their argument. Among the defendants here are brothers of Mr. Ross, and the contract will therefore be enforced for the benefit of all the legatees.

2. In consideration of the plaintiff's covenants, Mr. Ross barred himself of all marital right to her personalty, and also of all right to curtesy, and covenanted to devise her a life estate in the lots. Her covenants stand, then, not upon the consideration of marriage alone, (though that would be quite sufficient,) but upon a valuable pecuniary consideration in addition. And now let us see how the case stands in this view of it.

The doctrine, in relation to volunteers, belongs to the *law of gifts:* they are called volunteers because they claim a mere voluntary provision. Now, the general rule being that a *promise* to *give* will not be enforced, it, of course, became a question, in considering *executory* marriage articles, whether a covenant to settle was simply a promise to *give*, or was a covenant supported by a *sufficient consideration*. It was at first resolved thus: If the person to take was one for whom the settler was bound to provide — *ex. gra.*, a child — the duty of making provision was a meritorious consideration, and the covenant would be enforced; for it was not a mere gift. But if the taker was one for whom the settler was not bound to provide — *ex. gra.*, a collateral relation or a stranger — the covenant was not enforceable by the taker; because it was deemed a mere gift.

But it was soon discovered, that this rule, in its *practical* effect, was constantly defeating the intention of the parties, by diverting their estates from the objects of their bounty, and turning them into channels where they never intended they should go. The courts began, therefore, to introduce exceptions, and it was

soon firmly settled, that if any part, however small, of the consideration of the articles moved from a *third* person, it would support the covenant in favor of collaterals; and this upon a presumption that so it was intended, although the truth of the case might be directly the reverse. (9 How. 209.) But the courts did not stop here; for it was soon after intimated, that the *bare consent* of a father to the marriage of his son, was a sufficient consideration, moving from the former, to support a covenant to settle on a brother. Then it was ruled, in *Vernon* v. *Vernon*, 2 P. Wms. 594, that a liability to an action at law, on a covenant to settle on a brother, would authorize a decree for performance; or, that a desire, on the part of the intended husband to compensate the brother for a *void* legacy, would authorize such a decree; though no part of the consideration of the articles moved from a third person. And it has been held, that if the agreement be *under seal*, it imports a sufficient consideration, and will be enforced in favor of a collateral, a mistress, or a bastard. (*Beard* v. *Nuttall*, 1 Vern. 427; *Bunn* v. *Winthrop*, 1 J. C. R. 329.)

These exceptions, and others that might be mentioned, fully justified the remark of Lord Hardwicke, in *Stephens* v. *Trueman*, 1 Ves. sr., 74, when speaking of marriage articles, and the rule in question: "but as agreements are entire, *and the several branches might have been in view*, the court has, in later cases, laid hold of *any circumstances to distinguish them out of it*, still preserving the rule in general. If, therefore, there was *any kind of consideration*, the court would lay hold of it to support it." And with equal truth it was said, in *Neves* v. *Scott*, that the rule "has been made the subject of so many exceptions and qualifications, that it can scarcely, at this day, *be regarded as authority*." And it was surely high time to overturn a rule that would have said to Mr. Ross, (assuming this case to fall within it,) "You may pay to your intended wife $100,000 for her covenants, but that won't prevent her from claiming the residue of your estate; but if you will pay her $5,000, and get your nephew, Mr. Wilson, to pay her one dollar more, you can do what you please with your property; and your relatives will have the aid of the chancellor to enforce the performance of the contract."

But there is no such absurdity any longer existing, for the rule is now settled, both in England and the United States, that no part of the consideration need move from a third person, for the collaterals shall have performance though it move wholly from the husband or the wife. That was the necessary effect of *Vernon* v. *Vernon*, and the late case of *Davenport* v. *Bishopp*, 2 Younge and Collyer, 451, 21 Eng. Chy. Rep., puts the question completely at rest. It was a case of a marriage settlement, with *executory* covenants for a further settlement, which, *inter alia*, made a provision for a *niece* of the wife; and on a bill to compel performance, after the death of the wife and also of the niece, it was objected that the niece, and of course her heirs, were mere volunteers. But the Court overruled the objection, in language the most pointed, and held, that: "If two parties, for valuable consideration, enter into a contract of which one of the stipulations is solely for the benefit of a third person, who is a stranger to the contract, and from whom no consideration moves, it is not competent to either of the contracting parties afterwards to object to that stipulation."

And *Neves* v. *Scott* is equally decisive; the Court stating the law thus: "The result of all the cases, I think, will show, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit."

This is precisely our case, with the single exception, that, instead of an express limitation to the defendants, a power of appointment is given to Mr. Ross. But this, obviously, makes no difference; and, indeed, a power of appointment occurs quite as frequently in articles like these as does an express limitation.

Besides, the absence of a limitation makes no manner of difference where the intent of the parties is sufficiently apparent, as was distinctly held in *Knights* v. *Atkins*, 2 Vern. 20, approved in *Lechemere* v. *Carlisle*, 3 P. Wms, 217.

Kent lays down the general rule thus (2 Com., 173): "Equity

will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of *collateral relations*, as all such persons rest their claims on the ground of a valuable consideration."

And marriage being a valuable consideration of itself, our Supreme Court, in *Hardy* v. *Van Harlingen* enforced performance where there was no pecuniary consideration. And the remarks of the Court in *Davenport* v. *Bishopp*, and *Neves* v. *Scott* go to that extent.

3. I have already said that the doctrine of volunteers is part of the law on the subject of *gifts;* and that a mere promise to give will not be enforced. But it is equally well settled that an *executed* gift will not be set aside. And that is this case; for it cannot be denied that a devise or a legacy is an executed gift. We do not, then, ask, as plaintiff's counsel suppose, that the Court shall make us *cestuis que trust*, for we are already such by the testator's appointment. We stand upon an executed settlement, and not upon mere articles; and it will not be disputed, that when a *settlement* is made, there is no longer room to talk about volunteers. The property in question belonged to Mr. Ross, and by his marriage contract he acquired power to settle it upon whomsoever he pleased. He has made that settlement by his last will and testament, and there is nothing executory remaining in the case.

4. The contract is *under seal;* and, therefore, imports a sufficient consideration to enable collaterals to enforce it. *Beard* v. *Nuttall*, 1 Vern., 427; *Bunn* v. *Winthrop*, 1 J. C. R., 329.

5. The defendants are not here in the character of *actors*. They have neither brought this suit, or demanded affirmative relief. They ask no conveyance or release from the plaintiff, for they in nowise regard her covenants as executory. She is already barred, without any further act, as has been heretofore shown, and will be further shown hereafter. But it is only when a party is seeking affirmative relief, that he can be met with the objection that he is a volunteer.

XI. The plaintiff has no title to the personalty, either at law or in equity—and would not have, even had Mr. Ross died intestate. This is, of course, stronger doctrine than is necessary for our defense; but it is, nevertheless, true and well supported by authority. The principle is, that the ante-nuptial contract *takes the place of the law, so that the latter can never operate to vest any title in the widow;* and the estate, (except what the *contract* may give her,) is to be distributed *as though she had never existed.*

This principle was fully recognized and acted upon by the court in *Hardy* v. *Van Harlingen;* the court saying, in reference to the marriage agreement and its effect: "We regard this simply as a declaration that the legal rights of the husband shall not attach to this property, either during the life of the wife, *or upon her decease.*" And the court held that such was its effect, and made their decree accordingly.

In *Maurer* v. *the Ex'rs of Maurer*, 5 Md. Rep. 324, (decided as late as 1854,) it was held that a widow was not entitled to contest her husband's will, or to administer his estate if the will were void; because, by an ante-nuptial contract, she had covenanted that she would make no claim to his property. That it was no consequence to her whether he died testate or intestate; for, in either event, she had no title. And, referring to *Ward* v. *Thompson*, 6 Gill & Johns., 349, in which administration on a wife's estate had been refused to the husband, the court said: "We have no doubt that the court would have also decided, if the question had been before them, that Thompson had no interest *whatever* in any part of the wife's estate. *That is certainly the effect of the agreement in this case.*"

Davila v. *Davila*, 2 Vern., 724, is directly in point. Mr. Davila, before marriage, covenanted to pay his intended wife "£1,500 in a month after his decease, in full of dower, thirds, custom of London, or otherwise out of his real or personal estate." After the marriage, he "died *intestate* and without issue; his widow brought her bill against the administrator of her husband, to have a moiety of the personal estate by the *statute* for distribution of intestates' estates." Held, that she was not entitled to anything as distributee; but only to the £1,500.

And see 2 Ves., jr., 284, note 4, as follows: "A similar rule applies even as to personalty, in cases where it has been agreed by contract, before marriage, that the wife's claims in respect thereof shall be barred; there, if the husband die *intestate*, the next of kin take, *without any reference to the widow.*"

And 4 Ves., jr., 850, note 1: "So an agreement between *baron* and *feme*, barring a wife's claim to a distributive share under the custom of London, *throws such share into the general residue of the husband's personal estate*, which, if he die *intestate*, will be distributable amongst his next of kin only."

And so, in *Pickering* v. *Lord Stamford*, 3 Ves., jr., 331, the court said that the effect of an ante-nuptial contract "that the wife shall not claim either dower or personal estate," is not merely to give the husband a disposing power over it; for she "shall be barred though she does not give it away; *it is exactly as if there was no wife;* and the next of kin take *without any reference to her.*" And see note (a) to that case, page 331.

And Lord Hardwicke enunciated the same doctrine, in *Glover* v. *Bates*, 1 Atk. 439, when he said: "The wife's distributory share of her husband's personal estate, though not properly the subject of a release, may, certainly, be *extinguished by agreement.*"

Indeed, the doctrine is so well settled, that it is laid down in all the text books on the subject. See 2 Williams on Exs. 1277, sec. 2; 1 Bright's H. & W. 317, ¶ 32.

It will be observed, that no allusion is made to the *forum*, in laying down the rule; it is a rule that governs executors and administrators, as well as chancellors, in the distribution of estates. Wherever, whenever, and by whomsoever, the distribution is made, it is to be "*exactly as if there was no wife;*" and the reason is, that the parties have put their contract in the place of the law, and the right of the widow is thereby "*extinguished;*" or, rather, it *never attached.*

Nor does it matter how much her covenant is executory in form. It may be, as in most of the cases cited, that she will not claim, &c.; or, as in this case, that she "hereby binds herself to waive, renounce and relinquish," it operates, *per se*, and no further release or assurance is necessary.

XII. The legal title to the property is in the executors; and they have it in possession. The statute makes it their duty to convert it into money, and execute the will according to law. They must obey this mandate, unless restrained from doing so by a court of equity. No *other* court has any power to restrain them. And the plaintiff cannot restrain them by her own mere election; for, except as legatee, they must ignore her existence. Besides, as before shown, she has no election. As matters now stand, she is barred; and must continue to be barred, unless relieved from her contract by your Honor's decree. Hence she comes into court to ask your assistance. She asks you to arrest the administration of the estate, and make the executors yield to her their title and possession. She makes the legatees defendants, and seeks a bar to their claims by a judgment of the court. In order to effect this, she must first ask your Honor to set aside her contract, and confer upon her rights that have now no existence; rights that, by reason of her covenant, have never attached. That this is the case, I submit that I have shown; and being the case, who is the *actor?* Who is it brings this cause into court? Who is it asks affirmative relief? Who is it needs the aid of the chancellor?

But, say her learned counsel, the plaintiff's title is *legal*. Suppose it were so, what of that? Can a court of law afford her the relief she seeks? Can such a court stop the administration of the estate, take from the executors their title and possession, compel by its judgment a transfer to her, or adjudicate the questions between her and the legatees? To say nothing of the necessity of annulling her contract, what court of law can do either of these things? If she has a legal title, which I utterly deny—if her covenant remains executory, which I have shown is not the case—she still asks a *chancellor* to afford her relief, and to set him in motion, she must have a "*conscientious*" case. Whether she has such a case, I submit to your Honor.

A. G. THURMAN,
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